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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-5901

CONSUMERS UNION OF UNITED STATES, INC.,

Petitioner,

v.

PERIODICAL CORRESPONDENTS' ASSOCIATION, an unincorporated association, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETER H. SCHUCK

1714 Massachusetts Avenue, NW
Washington, D.C. 20036
(202) 785-1906

Attorney for Petitioner
Consumers Union of United
States, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consumers Union of United States, Inc. ("CU") hereby respectfully petitions for a writ of certiorari to review the judgment of a panel of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (Appendix A, infra) is reported at 365 F.Supp.

18. The opinion of the Court of Appeals panel (Appendix B, infra) is reported at 515 F.2d 1341.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1975 (Appendix B, infra). The jurisidiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether, in a suit not brought against Members of Congress or their personal or legislative aides, an association of journalists may invoke the Speech or Debate Clause to protect an unconstitutional act against a private citizen where such act lacks any significant nexus to the legislative process.

2. Whether a suit alleging an unconstitutional act against a private citizen by an association of journalists, and not brought against any Members of Congress or their personal or legislative aides, is justiciable.

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[1] References to the District Court and Court of Appeals opinions will cite to the official reports of the cases.

3. Whether the respondents violated petitioner's First and Fifth Amendment rights by barring Consumer Reports from full access to Congressional news on the basis of a vague standard regulating such access according to the content of the publication, which standard is applied in an arbitrary and discriminatory manner and without adequate procedural safeguards.

RULES INVOLVED

This case involves Rules 1 and 2 of the Rules Governing Periodical Press Galleries which are set forth in the Court of Appeals opinion, 515 F.2d at 1344-45.

This case also involves several provisions of the Constitution of the United States. Article 1, §5, cl.2 provides, in pertinent part:

> [e]ach House may determine the Rules of its Proceedings. . .

Article 1, §6, cl.1 provides,in pertinent part:

> . . . for any Speech or Debate in either House, [the Senators or Representatives] shall not be

questioned in any other Place.

The First Amendment to the Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech or of the press.

The Fifth Amendment to the Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law; . . .

STATEMENT OF THE CASE

A. Facts[2]

CU is a nonprofit organization established in 1936, the purposes of which, according to CU's charter, are to provide consumers with information and counsel on consumer goods and services, to give information on all matters relating to the expenditure of family income, and to initiate and to cooperate with individual and group efforts seeking to create

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[2] The facts in this case are undisputed. 365 F.Supp. at 20. References to all facts stated in this petition will cite to the Appendix and Supplemental Appendix filed in the Court of Appeals, which are designated herein as "App." and "Supp. App.", respectively.

and maintain decent living standards. CU derives virtually all of its income from the sale of its publications of interest to consumers qua consumers. Virtually all of this income is expended in the production of these publications. CU's major publication is its monthly magazine, Consumer Reports, which, at the time of suit, had a paid circulation of almost 2.2 million subscribers and newsstand patrons (Supp. App. 154).

Consumer Reports includes reports of independent product evaluations conducted by CU at its laboratory facilities in Mount Vernon, New York, and, in addition, "hard" news items and news analysis of general interest to consumers. Much of the news reported in Consumer Reports -- and an increasing proportion of total copy -- concerns Federal administrative, legislative and legal developments in areas of consumer protection, product safety, and consumer costs(Supp.App.154-55).

CU occasionally responds to written invitations from Congressional committees to testify on consumer issues, and occasionally presents its views on consumer issues to Federal administrative agencies on behalf of

consumers generally and/or on behalf of its members in their roles as consumers.

As a matter of long-established CU policy, neither CU nor its employees have ever engaged in lobbying activities with respect to any legislative body, and has no legislative program of any kind. CU has never pressed "claims" or sought to promote any narrow organizational interest of CU (Supp. App. 155).

CU accepts no advertising for publication in Consumer Reports nor does it accept product samples for testing and evaluation. CU strictly forbids the use of its ratings and product reports in advertising or for any other commercial purpose (Supp. App. 154-55).

In November 1972, CU employed a full-time Washington Editor of Consumer Reports to cover Congressional and other Federal developments of interest to consumers. His duties include investigating and reporting on bills introduced in, and hearings and debates conducted by, the Congress that may be of interest to the readers of Consumer Reports,

as well as the activities of Federal agencies and the courts of interest to consumers (Supp. App. 156). On November 21, 1972, he submitted an application to respondent Periodical Correspondents' Association ("the Correspondents") pursuant to Rule 1 of the Rules Governing Periodical Press Galleries ("the Rules"), seeking accreditation of Consumer Reports to the Galleries (App. 1-12). Accreditation to the Galleries provides journalists with a number of valuable privileges directly enhancing with access to, and ability to cover, news concerning Congressional activities.[3]

By letters dated January 9 and 29, 1973, the Correspondents rejected Consumer Reports' application for accreditation on the sole ground that it was not a publication "owned and operated independently of any industry, business, association or institution" as required by Rule 2 (App. 14, 109).[4] CU's

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[3] Some, but not all, of these privileges are listed in the Court of Appeals opinion, infra, 515 F.2d at 1345.

[4] Rule 2 also required that a publication, to be accredited, must be "published for profit and supported chiefly by advertising" (App.9). Consumer Reports is published by a nonprofit organization (Consumers Union) and carries no advertising (App. 108-09).

subsequent request that the Correspondents reconsider the application for accreditation was rejected (App. 15, 109). By letters dated May 18, 1973, CU requested the Senate Committee on Rules and Administration and the Speaker of the House of Representatives to exercise their supervisory authority under Rule 5 of the Rules to direct the Correspondents to admit Consumer Reports to membership in the Galleries (App. 16-19). By letter dated June 14, 1973, the chairman of the Senate Committee, acting on the recommendations of the Correspondents, concurred in the rejection (App. 24-27, 109). The Speaker of the House never responded to CU's request (App. 109).

B. Proceedings in the District Court

On July 3, 1973, CU filed suit in the United States District Court for the District of Columbia, invoking the court's jurisdiction under 28 U.S.C. §§1331(a), 1332(a)(1), and 2201. The Periodical Correspondents' Association and the Sergeants at Arms of the House and Senate were named as defendants.

The complaint sought a declaratory judgment declaring that the Correspondents'

refusal to accredit Consumer Reports to the Galleries constituted an abridgment of CU's First and Fifth Amendment rights. Initially, no injunctive relief was sought.[5]

After discovery, CU moved for summary judgment on the basis of undisputed facts reflected in four affidavits as well as admissions obtained from the respondents. App. 32-41. Following oral argument, the District Court (Gesell, J.) issued its memorandum opinion on October 11, 1973.

In its opinion, the Court first discussed the formal structure for administering the Galleries (365 F.Supp. at 20); the numerous advantages enjoyed by the Correspondents over those reporters who are unable to obtain admission(id. at 21-22); the ampleness of the gallery facilities (id. at 22); the nature of CU and Consumer Reports and the circumstances surrounding the Correspondents' rejection of

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5 There were several reasons for seeking only declaratory relief initially. See App. 121-23. When, after the District Court's decision, the Correspondents continued to exclude CU, CU's efforts to obtain injunctive relief pending the Correspondents' appeal were denied without opinion by the District Court, the Court of Appeals, and this Court. See App. 120, 129-42.

CU's application for Galleries membership (id. at 22); the complete absence of written guidelines for interpreting the "indefinite requirement contained in Rule 2" (id. at 22); the Correspondents' rejection of CU's application on the ground that CU "is not primarily a publishing organization"[6] and on the basis of "the content of the publication [and] the purpose of its parent association" (id. at 23); the Correspondents' exclusion of other publications with "an unquestionable interest... in keeping abreast of congressional activities", and the Correspondents' accreditation of many members who employ Congressional lobbyists (e.g., Time, Inc.) and/or who "undoubtedly represent the views of special interest groups" (e.g., National Timber Industry, Banking Industry Magazine) (id. at 23); the facts that "of the four press galleries in each House, only the periodical gallery is closed to advocacy groups or media not 'owned

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[6] The Court found, as an undisputed fact, that CU "receives virtually its entire revenue from Consumer Reports" (id. at 22) and it was not disputed that almost all of CU's revenues are expended in the production of its publications (Supp. App. 154).

and operated independently of any. . . institution'," and that the other galleries admitted "obviously partisan organizations" as a matter of course (id. at 23); and the facts that actual lobbyists are barred from all of the press galleries and that neither CU nor its correspondent lobbies (Id. at 23, n. 10).[7]

The Court then considered the question of justiciability, noting that "a congressional rule which infringes upon the constitutional rights of persons other than Congressmen presents a proper question for the judiciary." Before reaching that question, however, the Court considered the applicability of the Speech or Debate Clause.[8] Applying the tests set forth by this Court in Gravel v. United States, 408 U.S. 606 (1972) and Doe v. McMillan, 412 U.S. 306 (1973), the District Court concluded that the Correspondents' conduct in admitting periodicals to and excluding them from the Galleries

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[7] It was not disputed that CU has never engaged in lobbying activities of any kind (Supp. App. 155).

[8] The Court raised this issue sua sponte, respondents having refrained from asserting an immunity during the litigation.

"neither constitutes an integral part of nor has been shown to have a significant impact upon" congressional proceedings, and that there was no evidence that admission of publications which advocate a particular point of view would impede or disrupt such proceedings. Id. at 24-25.The Court therefore concluded that CU's claim was not subject to the Clause's immunity, and was justiciable. Id. at 25.

Proceeding to the merits, the court first set forth the test prescribed by this Court for limitations on the equal access of newsmen to facts of public consequence. The Court then stressed that the regulation at issue was"arbitrary and unnecessary"; that it had a significant impact on the content of news and upon the gathering of news by Consumer Reports; that the responsible Congressional officials had not forestalled such discrimination by the Correspondents by promulgating clear eligibility requirements or by other means; that the other galleries had admitted representatives of the foreign press and of politically active corporations, as well as consumer publications; and that exclusion of a publication could only be permitted under

carefully-drawn rules affording due process rights, including an opportunity for adequate impartial review. Id. at 25-27. The Court concluded by holding that the Correspondents had "flout[ed]" CU's First Amendment rights to freedom of the press, and Fifth Amendment rights to equal protection of the laws and due process of law, and entered a declaratory judgment to that effect.(App. 119).

C. The Decision of the Court of Appeals

A panel of the Court of Appeals for the District of Columbia Circuit, per District Judge Christensen of the District Court of Utah, reversed the judgment entered for CU by the District Court and remanded the case for dismissal as non-justiciable and in view of Speech or Debate Clause immunity.

The panel first noted that, in view of its holding of non-justiciability, it need not consider the merits of CU's constitutional claims.[9] 515 F.2d at 1346. Speculating that

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[9] The Court nevertheless offered a one paragraph dictum casually dismissing CU's constitutional claims as "tenuous", rejecting the necessity for any balancing of interests, and running rough-shod over the undisputed facts of record and found by the District Court. Id. at 1346-47. See infra pp.35-36 and n.31.

the case might involve "a nonjusticiable political question" because it involved a rule of Congress, the Court noted that CU was claiming a violation of constitutional rights and that such a claim arguably established justiciability under the test prescribed by this Court in United States v. Ballin, 144 U.S. 1, 5 (1892). Accordingly, the Court dispensed with any discussion or analysis of the "political question" doctrine[10] and turned instead to a consideration of the applicability of the Speech or Debate Clause immunity. Id. at 1347-48.

The panel began by discussing previous decisions of this Court defining the scope of such immunity. Purporting to distinguish several of these decisions by stating that the instant case was "not concerned with claimed bad faith or illegal conduct" by the Correspondents[11] (id. at 1348), it then concluded that the Correspondents, in excluding CU from the Galleries, were "enforcing internal rules of Congress" validly enacted,

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[10] Respondents have never even raised this argument.

[11] Whatever "bad faith" may mean in this context, CU has certainly claimed "illegal conduct" by the Correspondents.

and therefore had engaged in "legislative acts." Id. at 1350-51. It further stated that the Correspondents, in barring CU, "were acting by virtue of an express delegation of authority as aides or assistants of Congress"; that such action, if performed by Members, would have been protected by the Clause, and that such immunity therefore attached to the Correspondents as well. Id. at 1350-51. Declining to reach the question of "[w]hether a clearly non-legislative decision made by non-members would be immunized from judicial scrutiny when ratified expressly by Members of Congress", the panel concluded by stressing that its holding of non-justiciability was based on the fact that the Correspondents' acts were "in good faith" and "were within the spheres of legislative power committed to the Congress and the legislative immunity granted by the Constitution." Id. at 1351.

REASONS FOR GRANTING THE WRIT

The scope of the Speech or Debate Clause immunity -- and its applicability vel non to non-legislative functionaries -- has received increasing attention from this Court in recent years. E.g., Dombrowski v. Eastland,

387 U.S. 82 (1967); Powell v. McCormack, 395 U.S. 486 (1969); United States v. Brewster, 408 U.S. 501 (1972); Gravel v. United States, supra; Doe v. McMillan, supra; Eastland v. United States Servicemen's Fund, ___ U.S. ___, 95 S.Ct. 1813 (1975).[12] This Court has been at pains to harmonize the absolute immunity afforded by the Clause when Members or their personal aides are performing "legislative acts", Eastland at 1820-31, with the "judicial power to determine the validity of legislative actions impinging on individual rights" (Gravel at 620; Powell at 506) and the inequity of "invit[ing] gratuitous injury to citizens for little if any public purpose." McMillan at 316-17. As this Court recently put it:

> Our speech or debate privilege was designed to preserve legislative independence, not supremacy [citation omitted]. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic

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[12] These cases are referred to hereinafter as "Dombrowski", "Powell", "Brewster","Gravel", "McMillan", and "Eastland", respectively.

> balance of the three co-equal branches of Government.
>
> * * *
>
> [the Clause] tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process.

Brewster at 508 and 517 (Burger, Ch.J.).

The decision below neither recognizes the need for nor strikes any such balance, and, if permitted to stand, would expand the scope of the Clause far, far beyond the "finite limits" so carefully delineated by this Court in this line of cases, McMillan at 317, thus immunizing constitutional violations by all manner of functionaries having nothing whatsoever to do with the process of legislating. See infra p. 31. It effects this dramatic and unprecedented expansion along not one but all dimensions of the Clause's ambit: the scope of the "legislative tasks" protected by the Clause; the persons entitled to invoke it; and the effect of a putative congressional authorization of unconstitutional conduct on the ability of non-legislative functionaries to claim the immunity.

Significantly, this result is unnecessary to any purpose served by the Clause, going well "beyond the apparent needs of the 'due' functioning of the [legislative] process" (citations omitted, emphasis and brackets in original). Id. at 317. Moreover, this gratuitous expansion of the immunity arises in a case in which the immunized conduct, as found by the District Court on the basis of an undisputed record, "flouts the First Amendment" and violates equal protection and due process rights. 365 F.Supp. at 26-27.[13] Finally, this unconstitutional conduct not only continues but extends to other publishers and publications as well.[14]

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[13] The Court of Appeals declined to reach the merits. See infra pp.35-36 and n.31.

[14] See Affidavit of Luther J. Carter, reporter for Science magazine (App. 164-65). Subsequent efforts by both CU and the American Association for the Advancement of Science (the nonprofit publisher of Science) to obtain accreditation to the Galleries -- including a recommendation that the Correspondents amend the Rules to comport with the language of the rules of the other congressional galleries (i.e., prohibiting any lobbying by accredited correspondents) -- have met adamantine resistance by the Correspondents. The most recent such effort, like earlier ones, was rejected by the Correspondents on October 3, 1975.

A. The Speech or Debate Clause Issue

1. The Scope of the "Legislative Acts" Element of the Immunity

Each of this Court's recent decisions construing the Speech or Debate Clause has stressed that a critical prerequisite to its applicability is that the challenged conduct of the Member[15] be a "legislative act" or, to use the Court's alternative formulation, "within the 'sphere of legitimate legislative activity'." E.g., Gravel at 618; McMillan at 312-13; Eastland at 1821-22; Brewster at 512-13.

The Court of Appeals panel, however, eschewed any careful analysis of the nexus between the challenged conduct and the requirements of the legislative process. Its entire reasoning on this fundamental issue was as follows: picking up on a general phrase in the Gravel opinion -- "other matters which the Constitution places within the jurisdiction of either House" (id. at 625)[16] it concluded that simply because the

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[15] The applicability of the Clause to non-Members is discussed infra at pp.26-34.

[16] The syntax and context of that phrase,(contd)

Correspondents "were enforcing internal rules of Congress", the Clause necessarily applied to such activity. 515 F.2d at 1350.

But this Court has consistently required a far more integral relationship to the legislative process, even with respect to the acts of a Member. In Brewster, the Chief Justice addressed precisely this question in the context of an argument similar to that advanced by the Correspondents and the panel below:

> . . . It is urged that we held [in United States v. Johnson, 383 U.S. 169 (1966)] that the Clause protected from executive or judicial inquiry all conduct 'related to the due functioning of the legislative process'.... In stating that those things 'in nowise related to the due functioning of the legislative process' were not covered by the privilege, the Court did not in any sense imply as a corollary that everything that 'related to the office of a Member was shielded by

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however, indicate that the test for the Clause's applicability focuses on "the deliberative and communicative processes by which Members participate", and that the Clause only applies to an act that is "an integral part of those "processes", and whose legislative object includes matters within Congress' constitutional jurisdiction. See infra pp. 20-26.

> the Clause. Quite the contrary, in Johnson we held, citing Kilbourn v. Thompson, supra, that only acts generally done in the course of the process of enacting legislation were protected.
>
> Nor can we give Kilbourn a more expansive interpretation. (Emphases original)

Id. at 513-14. The Court continued:

> In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly part of the legislative process -- the due functioning of the process. (Emphases original)(footnotes omitted)

Id. at 515-16. And the Court concluded:

> The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions. . . .
>
> The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs

> but not a part of the legislative process itself....

Id. at 528. Certainly Gravel is wholly consistent with this Court's analysis in Brewster, decided the same day. After describing "the legislative process itself" -- "legislative speech or debate and associated matters such as voting and committee reports and proceedings"[17] beyond which the Clause does not "privilege illegal or unconstitutional conduct", id. at 620, the Court in Gravel again stressed the consistency of the precedents:

> But the Clause has not been extended beyond the legislative sphere. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. . .
>
> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House.

Id. at 624-25.[18] By the same token, the two

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[17] The same elements of the legislative process within the Clause's ambit are listed later in the Court's opinion. Id at 624.

[18] The Court held that Gravel's publication "was in no way essential to the deliberations (contd)

subsequent cases construing the Clause, McMillan and Eastland, are wholly consistent with this Court's test as set forth in Brewster and Gravel.[19]

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of the Senate", that requiring him to respond to suit did not "threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence", and that despite the fact that he published material that was the subject of committee hearings, the publication was not "part and parcel of the legislative process." Id. at 625-26.

[19] In Eastland, the challenged conduct -- a legislative committee investigation on a legislative subject -- fell well within the ample confines prescribed by that test. 95 S.Ct. at 1822-23. In McMillan, the Court was confronted with conduct -- the congressionally-authorized, public distribution of materials in committee reports -- which is directly related not only to a legislative activity (committee reports) immunized explicitly in Gravel, but also to an important educational function of Congress. Id. at 314. Acknowledging this direct relationship, the Court nevertheless went on to hold that because the material so distributed was actionable, this clearly legislative activity went "beyond the reasonable bounds of the legislative task" and "beyond the apparent needs of the 'due' functioning of the [legislative] process. [citation omitted]" (Emphasis and brackets original) Id. at 315 and 317.

Indeed, what is most striking about all of these cases is how consistently and without exception this Court has confined the applicability of the Clause's immunity to acts by a Member which are clearly an integral part of the legislative process per se: voting for a resolution (Kilbourn v. Thompson, supra and Powell); making a speech on the House floor (United States v. Johnson, 383 U.S. 169 (1966)); subpoenaing records for a committee hearing (Dombrowski and Eastland); events occurring at a subcommittee hearing (Gravel); and introducing materials at committee hearings, referring a committee report to the Speaker, and voting for publication of the committee report (McMillan at 312).[20] By fastening on one phrase[21] in a case confining the scope of the immunity to the process of legislating itself, the decision below ignores the clear thread established by this line of cases. By ignoring the undisputed factual record in the instant

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[20] See summary of cases in Brewster at 516, n.10.

[21] And even that phrase is torn from its syntax and context by respondents. See supra n.16.

case,[22] the decision below transgressed another clear principle established by this Court in cases construing the Clause:

> Our speech or debate privilege was designed to preserve legislative independence, not supremacy [citation omitted]....
>
> * * *
>
> ...the shield does not extend beyond what is necessary to preserve the integrity of the legislative process.

Brewster at 508 and 517. To uphold the panel's decision, therefore, "would be to invite gratuitous injury to citizens for little if any public purpose." See McMillan at 316-17.

Finally, it is clear that if a Member does not simply authorize an illegal act (by vote or other legislative means), but himself

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[22] The District Court found as facts, inter alia, that (a) the Rules were adopted solely to meet a problem which "occasionally arose many years ago before the establishment of the press galleries when certain reporters were provided seating on the floor itself [citation omitted]"; (b) the Correspondents' accreditation activity "neither constitutes an integral part of nor has been shown to have a significant impact upon the proceedings on the floor of either House...."; and (c) [t]here is...no basis for assuming, contrary to obvious undisputed facts, that the Houses of Congress were acting to protect the absolute right of Congressmen to speak and debate." 365 F.Supp. at 24-25.

engages in and executes an illegal act, such conduct, not being "essential to legislating", cannot be a "legislative act" entitled to the Clause's protection, quite apart from the wholly separate question of whether a Member can be required to answer for it. In particular,"[v]iolations of the commands of the First Amendment are not within the scope of a legitimate legislative purpose." (Emphasis original) McMillan at 328 (concurring opinion). In such a case, even the Member cannot invoke the Clause. Gravel at 621. See Eastland at 1823-24. Thus, an unconstitutional exclusion from the Galleries -- particularly an exclusion that has no relation to the specialized purposes of the Clause and "flouts the First Amendment", 365 F.Supp. at 26 -- could not be a "legislative act" entitled to protection, even if the exclusion had actually been executed by a Member.

2. The Persons Entitled to Invoke the Immunity

All of this Court's decisions under the Clause establish the following principle: if exclusion of Consumer Reports from the Galleries was not a "legislative act" to which the Clause's immunity applies, personal

aides of Members and, a fortiori, persons such as the Correspondents, are not entitled to invoke it. This question was settled in Gravel, where this Court held that while the Clause immunized all of Senator Gravel's conduct (and that of his personal aide) at the subcommittee hearing (Id. at 616 and 628-29), the private publication of the same congressional materials introduced and made public at a committee hearing was nevertheless not a "legislative act", even though performed by the Senator himself. Id. at 625-26. The Court concluded that since the Member enjoyed no immunity for such an act, and since the personal aide's immunity "is confined to those services that would be immune legislative conduct if performed by the Member himself", the aide could not invoke the immunity. Id. at 621-22. Accord, McMillan at 314-15.

Similarly, in the instant case, even if the appropriate congressional committees had themselves initiated action and voted to exclude Consumer Reports from the Galleries, and even if such exclusion were so integrally related to the process of legislating per se as to constitute a "legislative act" --

assumptions clearly belied by the record[23]--the Correspondents could not invoke the immunity to protect their execution of that unconstitutional congressional act. In Gravel, this Court addressed precisely this issue with respect to those "legislative acts" performed by Senator Gravel at the subcommittee hearing and therefore protected by the Clause. Reviewing the Kilbourn, Dombrowski, and Powell precedents, the Court stated;

> [In Kilbourn] [t]he Speech or Debate Clause could not be construed to immunize an illegal arrest even though directed by an immune legislative act. . . .
>
> * * *
>
> The three cases reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legisla-

[23]The undisputed facts are that the Speaker of the House of Representatives has never taken any action in this matter, and that the Senate Committee on Rules and Administration simply "abide[d] by the previous decision" by the Correspondents more than five months after that decision had been made. 515 F.2d at 1345; 365 F.Supp. at 22. As to the non-legislative nature of the exclusion, see supra pp.19-26.

> tive speech or debate and associated matters such as voting and committee reports and proceedings. . . . In each case, protecting the rights of others may have to some extent frustrated a planned or completed legislative act; but relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act. No threat to legislative independence was posed, and Speech or Debate Clause protection did not attach. (Emphasis supplied)

Id. at 619 and 620-21.

In view of these clear precedents, the panel's conclusory ipse dixit that the Correspondents were "performing delegated legislative functions", 515 F.2d at 1350, utterly fails to establish their right to invoke the Clause. See, e.g., McMillan at 316, n.10. To the contrary, several factors peculiar to the instant case distinguish the Correspondents from the aides to whom immunity was extended in the Gravel, McMillan and Eastland cases for their performance of "legislative acts" on behalf of Members.[24]

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[24] As discussed supra p. 27, the aide in Gravel could not invoke the Clause to protect (contd)

Unlike the "personal aide" involved in Gravel and the committee staff involved in McMillan and Eastland, the Correspondents are simply functionaries to whom Congress has given a very limited role having nothing whatsoever to do with the "deliberative and communicative processes by which Members participate in" activities "essential to legislation."[25] Gravel at 625, and Eastland at 1823, 1824. They are in fact not even Congressional employees but are simply private journalists who administer the Galleries from which they and certain journalistic colleagues -- but not those competitor journalists whom they exclude -- may report Congressional news for private periodicals. No one could seriously suggest that the Correspondents' accreditation activity is so "critical to the Members' performance that they must be treated as the latter's alter egos", Eastland at 1823,

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conduct not meeting the test for "legislative acts", even though it was authorized by the Senator. Accord, Dombrowski and McMillan (with respect to the Superintendent of Documents).

[25]The District Court explicitly so found. 365 F.Supp. at 24-25.

citing Gravel at 616-17.[26] Certainly, denial of immunity for them will not cause the purposes of the Clause to "inevitably be diminished and frustrated." Gravel at 616-17. Indeed, if the Association is immune from suit for "flout[ing] the First Amendment", 365 F.Supp. at 26 and infra pp.35-40, so are the Capitol groundskeepers, librarians, printers and parking lot attendants, all of whom are authorized by Congress to perform their functions.[27] Nothing in Eastland or any other decision of this Court even remotely suggests so expansive a view of the Clause; as indicated above, quite the contrary is the case.

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[26]Moreover, since the immunity is always that of the Member (408 U.S. at 621-22), it is striking that neither the Senate Committee nor the Speaker has invoked the Clause on the Correspondents' behalf, unlike the situation in Gravel where the Senator actually intervened to protect his own immunity by invoking it for his personal aide. Indeed, far from claiming immunity for the Correspondents, the Senate Committee only concurred in their decision more than five months after the fact; the Speaker has never even indicated any awareness of the Correspondents' action.

[27]In fact, it is not even clear that in excluding Consumer Reports simply because of "the content of the publication [and] the purpose of its parent association as well", 365 F.Supp. at 23, (contd)

Finally, no Member or committee of Congress has been sued or in any way involved in this litigation. This fact wholly obviates any justification for the Clause's application herein, since "[t]he purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." Powell at 505; Eastland at 1821.[28] In this connection, this Court's analysis -- and rejection -- of the claim of immunity by authorized

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the Correspondents were in fact "performing delegated legislative functions" as the court below asserted (Id. at 1350). The congressionally-promulgated Rules at issue in this case do not mention any such criterion, probably for the reason that such a criterion patently offends the Constitution by regulating the exercise of First Amendment rights according to the content of the publication. See infra pp.35-40.

[28]For the same reason, if the Clause is not applicable to the Correspondents, there will not be any "interfere[nce] with an ongoing activity by Congress", nor will any such activity "grind to a halt." Compare, Eastland at 1825, n.16.

congressional functionaries[29] in McMillan is, mutatis mutandis, directly apposite to the instant case:

> We cannot believe that the purpose of the Clause -- 'to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary' [citations omitted] -- will suffer in the slightest if it is held that those who, at the direction of Congress or otherwise, distribute actionable material to the public at large have no automatic immunity under the Speech or Debate Clause but must respond to private suits to the extent that others must respond in light of the Constitution and applicable laws. To hold otherwise would be to invite gratuitous injury to citizens for little if any public purpose. We are unwilling to sanction such a result, at least absent more substantial evidence that, in order to perform its legislative function, Congress must not only inform the public about the fundamentals of its business but also must distribute to the public generally materials otherwise actionable under local law. [Footnote omitted] (Emphasis supplied)

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[29] Unlike the Correspondents, the Superintendent of Documents is a Congressional employee.

Id. at 316-17. In the instant case, there is in fact substantial evidence that in order for Congress to control "the personal conduct of [journalists] in the galleries", it is not necessary for the Correspondents "to control what [journalists] write or believe." 365 F.Supp. at 22.

B. The Justiciability Issue

The court below linked its Speech or Debate Clause holding to an assertion that "this case is non-justiciable because it involves matters committed by the Constitution to the Legislative Department..." 515 F.2d at 1346. In doing so, the court did no more than note that Congress is authorized by Article I, §5 to "determine the Rules of its Proceedings", and cryptically concluded from this fact that neither the Rule at issue in this case nor its application by the Correspondents could be inquired into, regardless of its effect on the constitutional rights of citizens (id. at 1347), citing as its sole authority United States v. Ballin, 144 U.S. 1 (1892), a case in which (as the court below seems to acknowledge, id. at 1348, n.13) this Court stated precisely the opposite:

> ...(Congress) may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.

144 U.S. at 5.[30] Even more notably, the court below also cited the test for justiciability set forth by this Court in Powell, but proceeded to ignore the central fact that Powell applied that test in the context of a very controversial challenge to Congress' exclusion of its own Member and nevertheless held that neither the "political question" doctrine nor separation of powers considerations rendered such a claim non-justiciable. Id. at 548-49. See also, McMillan at 318, n.12. Similarly, in the instant case, the constitutional claims are clearly justiciable.

C. The Merits of Petitioner's Constitutional Claims

The Court of Appeals did not reach the merits of CU's First and Fifth Amendment

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[30] This Court has reaffirmed this principle on several occasions. See, e.g., United States v. Smith, 286 U.S. 6, 33 (1932); Yellin v. United States, 374 U.S. 109, 114, 143-44 (1963).

claims, 515 F.2d at 1346.[31] The District Court, however, did carefully analyze those claims. 365 F.Supp. at 25-27. It concluded that "[t]he situation disclosed by this undisputed record flaunts the First Amendment", 365 F.Supp. at 26, and also upheld CU's equal protection and due process claims. Id. at 26-27. Its reasoning in support thereof is set forth at some length in the opinion itself, and need not be rehearsed herein.

Several recent cases reported since the District Court's decision further strengthen

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[31] In a brief dictum, however, it flatly asserted that any balancing of First Amendment and legislative considerations was "unnecessary", simply citing several easily distinguishable cases (e.g., Eastland did not even address the merits in light of its holding that the Clause applied, id. at 1824-25, and Saxbe v. Washington Post Co., 417 U.S. 843, 94 S.Ct. 2811 (1974) stressed the special considerations limiting media access to prisoners in the non-public prison setting, id. at 2814), and completely contradicting undisputed facts of record found by the District Court. Id. at 1346-47. Thus, the District Court found that CU was placed in a less advantageous position than the press generally, 365 F.Supp. at 23, 25-26; that its exclusion was not based upon distinctions applied to others in similar situations, id. at 23, 26; and that the Correspondents were not acting within the legislative sphere, id. at 24-25.

its conclusion. In Lewis v. Baxley, 368 F. Supp. 768 (M.D.Ala. 1973) (three-judge court), a strikingly similar case, the court held that a reporter's First Amendment right of reasonable and equal access to news about the state legislature was violated facially by an Alabama statute that required reporters covering such news to file individual statements of financial interests. In so holding, the court carefully considered two putative state interests -- "protection of the public from interested and improperly influenced news coverage and protection of the legislature from surreptitious lobbying newsmen" (Id. at 779) -- and concluded that neither interest justified the regulation at issue:

> A part of the requirement of a substantial nexus...is the requirement that the state pursue its governmental interest narrowly rather than broadly. In the context of this case, that requirement means that the state may regulate lobbying and lobbyists as such, but the state may not require disclosure from occupational groups virtually at random upon the theory that one or more members may be lobbyists. If this is the governmental interest to be protected, the state should

> make its attack upon lobbyists as such. In fact, the state does have comprehensive statutes not here under attack which deal with the narrow question of lobbying as a specific activity. If newsmen engage in lobbying, there appears to be nothing to suggest that they are immune from control under such lobbying statutes. The State has offered no evidence of inability under its general lobbying provisions to ferret out genuine lobbyists among newsmen, if such exist. (Id. at 780, footnote omitted)[32]

Most recently, in Southeastern Promotions, Ltd. v. Conrad, ___ U.S. ___, 95 S.Ct. 1239 (1975), this Court held that the system by which the Board of Directors of municipal

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[32]Compare, the Court of Appeals' brief and curious disposition of this issue. 515 F.2d at 1342-43 and 1347, n.12. Accord, Borreca v. Fasi, 369 F.Supp. 906 (D. Hawaii 1974) (Mayor of Honolulu enjoined from barring newspaper reporter from his general, on-the-record news conferences because of the newspaper's content); Kovach v. Maddux, 238 F. Supp. 835 (M.D. Tenn. 1965) (Tennessee Senate enjoined from enforcing resolution barring certain reporters from the press gallery; Dorfman v. Meiszner, 430 F.2d 558, 561 (7th Cir. 1970) (Federal court's rule restricting access by broadcasters and photographers to certain areas enjoined as constitutionally overbroad).

theaters (who were appointed by elected officials) regulated the use of its theaters -- which system was strikingly similaw to the system of regulation in the instant case, id. at 1244-45[33] -- constituted a classic prior restraint, and did not qualify for any of the established exceptions to the constitutional prohibition against prior restraints. Id. at 1247-48.[34] The Court also

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[33]As in the system in Southeastern Promotions, one seeking to use the Galleries must apply to the Correspondents. The Correspondents determine whether to admit the applicant according to their view of the content of the publication and the motives of the publishing organization. Admission depends upon the Correspondents' affirmative action. Admission is not routine but involves "the 'appraisal of facts, the exercise of judgment, and the formation of an opinion'" by the Correspondents. The Correspondents have kept Consumer Reports (and Science) out of the Galleries. The Correspondents did not admit these publications to the Galleries and rely upon expulsion if they behaved in an improper manner. Rather, they "denied the applications in anticipation that [the publications] would violate the law." See 95 S.Ct. at 1244-45 and 1246-47.

[34]Similarly in the instant case. The Galleries do not serve a competing use: the rejection of CU's application was not based on any "housekeeping considerations; no rights of third parties would be violated by admission; and there was no captive audience.

noted that the prior restraint was no less obnoxious for effecting only a partial suppression of First Amendment rights, id. at 1245, and stressed the absence of procedural safeguards against abuse of these rights. Id. at 1247. Reviewing its First Amendment precedents, this Court reiterated the "theory deeply etched in our law" in words directly applicable to the Correspondents' " prophylactic" and discriminatory application of the Rule at issue in this case (id. at 1246):

> a free society prefers to punish the few who abuse rights of speech after they break the law rather than to throttle them and all others beforehand (emphasis original).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted with respect to each of the three questions on which it is sought.

Respectfully submitted,

PETER H. SCHUCK

1714 Massachusetts Ave.,NW
Washington, D.C. 20036
202/785-1906

Attorney for Petitioner

October 20, 1975

APPENDIX A

CONSUMERS UNION OF UNITED STATES, INC., Plaintiff,

v.

PERIODICAL CORRESPONDENTS' ASSOCIATION et al., Defendants.

Civ. A. No. 1328-73.

United States District Court,
District of Columbia.
Oct. 11, 1973.

Declaratory judgment action brought by consumer's organization against association of periodical correspondents and sergeants-at-arms of United States Senate and of House of Representatives challenging exclusion of plaintiff's representatives from periodical press galleries of Senate and House. The District Court, Gesell, J., held that the claim presented was justiciable and that exclusion of plaintiff organization's magazine from accreditation to periodical galleries violated Constitution.

Judgment accordingly.

1. Courts ⇐281

Claim is justiciable if the duty asserted can be judicially identified, its breach judicially determined, protection for right asserted can be judicially molded, and it does not involve political question best left to other branches of federal government.

2. Constitutional Law ⇐70.1(1)

Although courts will not normally interfere with manner in which Congress chooses to regulate its internal procedures, congressional rule which infringes upon constitutional rights of persons other than congressmen presents a proper question for judiciary.

3. Courts ⇐281

Court will not reach question whether congressional rule infringes upon constitutional rights of persons other than congressmen if action in

which it is presented is barred by legislative immunity. U.S.C.A.Const. art. 1, § 6.

4. Declaratory Judgment ⇐329

Although defendants, association of periodical correspondents and sergeants-at-arms of Senate and House, did not assert congressional immunity in pleadings in declaratory judgment action challenging exclusion of plaintiff's representatives from periodical press galleries of Senate and House, court would raise issue sua sponte because of deference owed by judiciary to coordinate branch of government. U.S.C.A.Const. art. 1, § 6.

5. United States ⇐12

Speech and debate clause of Constitution protects congressmen from being called into court to defend action undertaken as integral part of deliberative and communicative processes by which members participate in congressional proceedings with respect to consideration and passage or rejection of proposed legislation or with respect to other matters which Constitution places within jurisdiction of either house. U.S.C.A.Const. art. 1, § 6.

6. United States ⇐12

Immunity from suit under speech and debate clause of Constitution extends to agents of Congress, but only to extent that their conduct would have been protected if performed by legislators themselves. U.S.C.A.Const. art. 1, § 6.

7. United States ⇐12

Speech and debate clause did not shield association of correspondents and sergeants-at-arms of Senate and House from challenge to their policies excluding from periodical press galleries representatives of publications advocating particular points of view, in absence of showing that, if such representatives were admitted, congressional proceedings would be impeded or disrupted. U.S.C.A.Const. art. 1, § 6.

8. United States ⇐12

In suits against congressional agents, official immunity does not extend beyond scope of the speech and debate clause. U.S.C.A.Const. art. 1, § 6.

9. United States ⇐12

Inasmuch as admission to correspondents' association or to press galleries of Senate and House need not be dependent upon access to anterooms, whatever immunity might attach to activities concerning those rooms could not extend to other press facilities, privileges or organizations. U.S.C.A.Const. art. 1, § 6.

10. Constitutional Law ⇐70.1(7)
United States ⇐22

Rules governing personal conduct of members of press while in galleries of Senate or House or exercising attendant privileges of membership in association of correspondents admitted to special galleries, as opposed to rules designed to control what members write or believe, were beyond judicial scrutiny and houses of Congress could take appropriate action of that kind.

11. Constitutional Law ⇐90.1(8)

Press must be free to criticize officials and to discuss public affairs with impunity and free press is undermined if access of certain reporters to facts relating to public's business is limited merely because they advocate particular viewpoint. U.S.C.A.Const. Amends. 1, 5.

12. Constitutional Law ⇐90.1(8)

Courts have responsibility to preserve freedom of press by barring imposition of limitations upon equal access of newsmen to facts of public consequence, unless such limitations are clearly justified by a legitimate demonstrable government interest, where freedom of press or other First Amendment rights are involved. U.S.C.A.Const. Amends. 1, 5.

13. Constitutional Law ⇐90.1(8)

Government's interest raised in defense of limitations on equal access of newsmen to facts of public consequence

must be an important or compelling one, means selected for furthering that interest must be no more restrictive of individual rights than is reasonably necessary and language of classification may not be so vague or broad that it unnecessarily chills exercise of those rights or provides insufficient guidance to those who must administer the challenged legislation. U.S.C.A.Const. Amends. 1, 5.

14. Constitutional Law ⇐90.1(8)

Reporters do not have an unrestricted right to go where they please in search of news. U.S.C.A.Const. Amends. 1, 5.

15. Constitutional Law ⇐90.1(8)

Access to news, if unreasonably or arbitrarily denied by congressional action or publishers meeting under congressional auspices, constitutes a direct limitation upon content of news and is unconstitutional. U.S.C.A.Const. Amends. 1, 5.

16. Constitutional Law ⇐90.1(8)

All types of publications are entitled to equal freedom to hear and publish official business of Congress. U.S.C.A.Const. Amend. 1.

17. Constitutional Law ⇐90.1(8)

Constitution requires that congressional press galleries remain available to all members of working press, regardless of their affiliation. U.S.C.A.Const. Amend. 1.

18. Constitutional Law ⇐90.1(8)

Exclusion of representatives of publication from congressional press galleries can only be sanctioned under carefully drawn definite rules developed by Congress and specifically required to protect its absolute right of speech and debate or other compelling legislative interests. U.S.C.A.Const. art. 1, §§ 5, 6; Amends. 1, 5.

19. Constitutional Law ⇐274.1(2)

Rules developed by Congress with respect to admission to congressional press galleries must be so fashioned that due process is provided prior to exclusion, with opportunity for adequate and impartial review whenever a publication is excluded. U.S.C.A.Const. Amends. 1, 5.

20. Constitutional Law ⇐90.1(8), 211, 255(1), 278(1)

Portions of rules barring from periodical press galleries of House and Senate representatives of periodicals not owned and operated independently of any industry, business, association or institution violated freedom of press guaranteed by First Amendment and continuing refusal of association of periodical correspondents to accredit magazine published by consumers' organization and its designated representatives to the periodical press galleries, based upon interpretation of the rules, constituted abridgement of freedom of press, denial of equal protection of laws, and deprivation of liberty and property without due process of law. Federal Regulation of Lobbying Act, § 308, 2 U.S.C.A. § 267; U.S.C.A.Const. art. 1, §§ 5, 6; Amends. 1, 5.

Peter H. Schuck, Carol A. Cowgill, Washington, D. C., for plaintiff; Marvin M. Karpatkin, Ohrenstein & Karpatkin, New York City, of counsel.

Peter R. Reilly, Asst. U. S. Atty., Washington, D. C., for defendants.

MEMORANDUM OPINION

GESELL, District Judge.

This is a declaratory judgment action by Consumers Union of United States, Inc., naming the Periodical Correspondents' Association and the Sergeants-at-Arms of the United States Senate and of the House of Representatives as defendants. The issues are before the Court on cross-motions for summary judgment and have been fully briefed and argued.

Consumers Union, publisher of a monthly magazine known as *Consumer Reports*, has been denied accreditation to the periodical press galleries of the Senate and House and claims that this action, taken in reliance on Rule 2 of the Rules Governing the Periodical Press Galleries, is unconstitutional. There is no disagreement as to the relevant facts.

I. *Facts*

In order to facilitate press coverage of congressional deliberations, both Houses of Congress have each set aside four separate gallery sections for periodicals, radio and television, newspapers, and press photographers. By rules adopted pursuant to Article I, § 5 of the United States Constitution,[1] the Senate and House have delegated the authority to administer these galleries and promulgate regulations governing them to the Senate Committee on Rules and Administration and to the Speaker of the House, respectively.[2] The Senate Committee and the Speaker have, in turn, adopted regulations for the different press galleries. These are published annually in the *Congressional Directory*, along with the names of the accredited organizations and their approved representatives.[3] They have also authorized the formation of separate correspondents' associations for each type of gallery, composed of newsmen approved for admission to the press galleries, and empowered them to pass upon applications for admission and otherwise to administer the press facilities.[4]

The defendant Periodical Correspondents' Association, for example, administers the Periodical Press Galleries of both Houses. As of March 10, 1973, it consisted of 525 members chosen from the 126 accredited publications.[5] The Association has a seven-man Executive Committee, elected by the membership, which is authorized to issue credentials to reporters whose applications are considered in compliance with the Rules Governing Periodical Press Galleries adopted by the Speaker and the Senate Committee on Rules and Administration. Final authority to grant or reject such applications is lodged in the Speaker and the Senate Committee, but it is rarely exercised.

Members of the Periodical Correspondents' Association enjoy a variety of advantages over those reporters who are unable to obtain admission. They are provided with special seating in the Periodical Press Galleries, and therefore do not have to contend for space in the public galleries. Congress furnishes the Association a variety of other facilities, including telephones and typewriters in a room adjacent to the press galleries, and employs four administrators to assist the Association in maintaining these facilities. Members are also permitted entrance to the Senate Presi-

1. U.S.Const. art. I, § 5: "Each House may determine the Rules of its Proceedings. . . ."

2. *See* Rule 34, Rules and Manual of the United States Senate 52–53 (1971):

> [The Senate Committee on Rules and Administration] shall make such regulations respecting the reporters' galleries of the Senate, together with the adjoining rooms and facilities, as will confine their occupancy and use to bona fide reporters for daily newspapers and periodicals, to bona fide reporters of news or press associations requiring telegraph service to their membership, and to bona fide reporters for daily news dissemination through radio, wire, wireless, and similar media of transmission. These regulations shall so provide for the use of such space and facilities as fairly to distribute their use to all such media of news dissemination.

Rule 34, Rules of the House of Representatives, 91st Cong., 2d Sess. 535 (1971):

> Such portion of the gallery over the Speaker's chair as may be necessary to accommodate representatives of the press wishing to report debates and proceedings shall be set aside for their use, and reputable reporters and correspondents shall be admitted thereto under such regulations as the Speaker may from time to time prescribe; and the supervision of such gallery, including the designation of its employees, shall be vested in the standing committee of correspondents, subject to the direction and control of the Speaker; . . .

3. The Court takes judicial notice of the Directory. Current listings appear at *Congressional Directory*, 93d Cong., 1st Sess. 843–929 (1973). These rules may also be found in Rule VI, Rules for Regulation of the Senate Wing of the United States Capitol 119–27.

4. *See Congressional Directory*, supra note 3, at 844–45, 886–87, 900–901, 916–917. House Rule 34 appears to have contemplated administration by the correspondents themselves. *See* note 2 *supra*.

5. *Id.* at 918–29.

dents' Room and the House Speaker's Lobby, where they may seek or arrange interviews with Senators and Congressmen. Press tables are provided for members during congressional committee meetings open to the public. Another most significant privilege is involved. Members of the press galleries are granted exclusive permission to attend on-the-record daily press conferences held by the Senate leadership and the Speaker of the House. Membership also greatly facilitates access to press conferences at the White House and administrative agencies.

There are ample periodical press facilities. Many publications have a large number of members entitled to the privileges of the galleries.

Consumer Reports is a monthly periodical published by plaintiff with a circulation of nearly two and a quarter million readers. Plaintiff is a non-profit organization which receives virtually its entire revenue from *Consumer Reports*, which sells at newsstands and by subscription but has no advertising. A review of recent publications, of which the Court takes notice, discloses reports on the quality and attributes of named products and articles and comment of interest to consumers. On November 29, 1972, Mr. Gilbert Thelen, Jr. submitted to the Executive Committee of the Periodical Correspondents' Association a written application for membership as a representative of *Consumer Reports*. The application was rejected by the Committee on the ground that *Consumer Reports* is not "owned and operated independently of any industry, business, association, or institution," as required by Rule 2 of the Rules Governing Periodical Press Galleries.[6]

Arguing that the rejection of *Consumer Reports* was arbitrary, plaintiff asked the Executive Committee to reconsider its decision, but Mr. Thelen's application was again rejected on April 16, 1973. On May 18, plaintiff sought review by the Speaker of the House and the Senate Committee on Rules and Administration. The Senate Committee concurred in the rejection, and the Speaker has made no reply during the four months since plaintiff's request.

Defendants concede that no written guidelines exist for interpreting the indefinite requirement contained in Rule 2. However, during plaintiff's pursuit of its administrative remedies, the basis for its rejection was clarified in a number of significant particulars. Thus, Senator Cannon, Chairman of the Committee on Rules and Administration, was advised by the Association as follows:

> "Consumer Reports" does not appear to qualify for admission under Rule II of the Rules Governing the Galleries.
>
> In part, that rule states that no publication can be eligible for admission if it is published by "an association or institution." "Consumer Reports" is published by Consumers Union, a nonprofit organization which is a self-proclaimed advocate of consumer interests and, among other activities, testifies before Congressional committees in behalf of the interests of consumers, as Consumers Union judges those interests.
>
> It is the consensus of the Executive Committee that there is an almost exact parallel between Consumers Union's publication of the magazine "Consumer Reports," and the U. S. Chamber of Commerce's publication, "Nation's Business." If the former were admitted as a journalistic enterprise while its primary purpose was the promotion of consumer interests, the latter then might well qualify to pursue the primary purpose of promoting business interests.
>
> Indeed, it is the opinion of the committee that if any advocacy group's publication is admitted, it might be difficult in all fairness to deny admission to union publications, house organs of corporations, foundation publications, university magazines, etc.

6. *Id.* at 916–17.

> It is our understanding that Rule II was promulgated for the express purpose of preventing such advocacy groups from contacting and importuning Senators and Congressmen under the guise of journalists. . . .[7]

This analysis has been summarized by Donald E. Smith, Chairman of the Association's Executive Committee, who characterized plaintiff in the following terms:

> The publication Consumer Reports is affiliated with plaintiff which is an "association" under the Rules because it is not primarily a publishing organization but rather is an association organized to work in the interests of consumers. It is this in the nature of plaintiff which distinguishes it from admitted publications and disqualifies Consumer Reports under the Rules. . . .[8]

The record thus fully supports Mr. Smith's statement that

> The Executive Committee evaluates an application not only on the content of the publication but on the purpose of its parent association as well. . . .[9]

Under the fuzzy tests apparently applied, such periodicals as the Rippon Society's *Rippon Forum*, the Navy League's *Sea Power*, and the National Welfare Rights Organization's *Welfare Fighter* have been denied admission to the Association, despite the unquestionable interest that these publications have in keeping abreast of congressional activities.

Plaintiff points out that many of the Association's present members would appear to fall within the broad scope of Rule 2, both as written and as interpreted by the Committee. For example, Time, Inc. employs a lobbyist in order to advance its views concerning congressional action on postal rates, and such organizations as *Modern Tire Dealer*, *National Timber Industry*, and the *Military Retirees Journal* undoubtedly represent the views of special interest groups. Other members include *Automotive News*, *Banking Industry Magazine*, *Drug Topics and Drug Trade News*, *Food Processing & Marketing*, *Investment Dealer's Digest*, *Leather & Shoes Magazine*, *Pacific Shipper*, and *Western Stamp Collector*.

It is also significant that, of the four press galleries in each House, only the periodical gallery is closed to "advocacy" groups or media not "owned and operated independently of any . . . institution."[10] Such obviously partisan organizations as the official news agencies of foreign governments are admitted to the radio and television, photographers, and newspaper galleries as a matter of course. Indeed, Consumer News, Inc., is presently accredited to the newspaper correspondents galleries.

Since the controversy as to plaintiff's accreditation continues and the issues are significant, the Court must attempt to resolve the dispute.

II. *Justiciability*

[1, 2] Before reaching the merits of plaintiff's claim, the Court must determine whether the issues raised are justiciable. A claim is justiciable if "the duty asserted can be judicially identified

7. Letter from Donald E. Smith, Chairman of the Executive Committee of the Periodical Correspondents' Association, to Senator Howard W. Cannon, Chairman of the Senate Committee on Rules and Administration, June 6, 1973.

8. Affidavit of Donald E. Smith, p. 4.

9. *Id.*

10. Actual lobbyists are barred from all of the press galleries. However, defendants do not specifically characterize plaintiff or Mr. Thelen as lobbyists, nor would such a claim be likely to succeed in view of the fact that Congress has expressly exempted from the lobbyist registration statute all periodicals "which in the ordinary course of business . . . [publish] news items, editorials, or other comments . . . which directly or indirectly urge the passage or defeat of legislation. . . ." 2 U.S.C. § 267. Neither plaintiff nor Mr. Thelen has registered as a lobbyist, nor do they lobby.

and its breach judicially determined, and . . . protection for the right asserted can be judicially molded," Baker v. Carr, 369 U.S. 186, 198, 82 S.Ct. 691, 700, 7 L.Ed.2d 663 (1962), and so long as it does not involve a "political question" best left to the other branches of the Federal Government, Powell v. McCormack, 395 U.S. 486, 518, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). Although the courts will not normally interfere with the manner in which Congress chooses to regulate its internal procedures, it is well established that a congressional rule which infringes upon the constitutional rights of persons other than Congressmen presents a proper question for the judiciary. Yellin v. United States, 374 U.S. 109, 143–144, 83 S.Ct. 1828, 10 L.Ed.2d 778 (1963); United States v. Ballin, 144 U.S. 1, 5, 12 S.Ct. 507, 36 L.Ed. 321 (1892).

[3–6] However, the Court will not reach that question if the action in which it is presented is barred by legislative immunity. Although the defendants did not assert an immunity in their pleadings, the Court raised the issue *sua sponte* in the course of oral argument because of the deference owed by the judiciary to a coordinate branch of government. The Speech and Debate Clause [11] of the United States Constitution protects Congressmen from being called into court to defend actions undertaken as "an integral part of the deliberative and communicative processes by which Members participate in [congressional] proceedings with respect to consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, 408 U.S. 606, 625, 92 S.Ct. 2614, 2627, 33 L.Ed.2d 583 (1972). *See also* Doe v. McMillan, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973). This immunity from suit extends to the agents of Congress, but only to the extent that their conduct would have been protected if performed by the legislators themselves. Gravel v. United States, *supra*, 408 U.S. at 618, 92 S.Ct. 2614.

[7, 8] The defendant Association and Sergeants-at-Arms are undoubtedly congressional agents acting at the specific behest of Congress and pursuant to its rules. However, their conduct in barring the representatives of certain publications from the periodical press galleries and admitting others neither constitutes an integral part of nor has been shown to have a significant impact upon the proceedings on the floor of either House. Defendants have failed to make a showing that if members of the press whose publications advocate a particular point of view are admitted to the galleries, congressional proceedings will be impeded or disrupted.[12] In the absence of such a showing, it must be concluded that the Speech and Debate Clause does not shield the defendants from a challenge to their admission policies.[13]

It is not for the U. S. Attorney or the Court to speculate about the underlying reasons prompting the exclusion here attempted. The justification, if one exists, must affirmatively appear from the reasons given for legislation and its implementing rules. There is nothing of substance in these materials supporting the action and therefore no basis for assuming, contrary to obvious undisputed facts, that the Houses of Congress were

11. U.S.Const. art. I, § 6: "The Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place."

12. The available legislative history indicates only that problems occasionally arose many years ago before the establishment of the press galleries when certain reporters were provided seating on the floor itself. *See* Cong.Globe, 32d Cong., 2d Sess. 52 (1852).

13. The only other immunity that might be applicable is the so-called Official Immunity Doctrine discussed in Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959). However, in suits against congressional agents, official immunity does not extend beyond the scope of the Speech and Debate Clause. Doe v. McMillan, *supra*, 412 U.S. at 323, 93 S.Ct. 2018.

acting to protect the absolute right of Congressmen to speak and debate.

[9, 10] The fact that Association members have access to anterooms adjacent to the floor of each House and closed to the general public could present a special problem. If either House of Congress determined that the informal discussions carried out in those rooms constitute an integral part of the legislative deliberation, the judiciary could not properly entertain a suit against any person enforcing rules limiting access to such rooms. However, that issue is not before the Court. Admission to the Association or to the press galleries need not be dependent upon access to the anterooms, so whatever immunity might attach to activities concerning those rooms cannot extend to other press facilities, privileges or organizations. It is equally clear that rules governing the personal conduct of members while in the galleries or exercising the attendant privileges of such membership, as opposed to rules designed to control what members write or believe, are beyond judicial scrutiny and the Houses of Congress can take appropriate action of this kind.

Accordingly, the claim here presented is justiciable and the Court must turn to the merits.

III. *The Merits*

Plaintiff's principal contention on the merits is that Rule 2 of the Rules Governing Periodical Press Galleries, on its face and as interpreted by the Executive Committee of the Association and the relevant congressional authorities, violates plaintiff's First Amendment right to freedom of the press and its Fifth Amendment right to due process and the equal protection of the laws.

[11] In applying the facts to these serious constitutional claims it is unnecessary to expatiate at any length upon the role of the press in our society. The press must be free to criticize officials and to discuss public affairs with impunity. Halfway measures will not protect this precious freedom. A free press is undermined if the access of certain reporters to facts relating to the public's business is limited merely because they advocate a particular viewpoint. This is a dangerous and self-defeating doctrine.

[12, 13] The Courts have a responsibility to preserve the freedom of the press by barring the imposition of limitations upon the equal access of newsmen to facts of public consequence unless such limitations are clearly justified by a legitimate and demonstrable government interest where freedom of the press or other First Amendment rights are involved. Moreover, the government interest raised in defense of such limitations must be an important or "compelling" one. Police Dept. of the City of Chicago v. Mosely, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). The means selected for furthering that interest must be no more restrictive of individual rights than is reasonably necessary. Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). And the language of the classification may not be so vague or broad that it unnecessarily chills the exercise of those rights or provides insufficient guidance to those who must administer the challenged legislation. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L. Ed.2d 830 (1973).

[14, 15] Defendants seek to confuse and minimize these issues. They suggest, that the First Amendment is not violated because there is no effort to control the content of news, that the galleries are not open to the general public, and that those excluded from the press galleries may gain access to news concerning congressional activities by using the public galleries and other resources available. Upon analysis these contentions are wholly without merit. While it is perfectly true that reporters do not have an unrestricted right to go where they please in search of news, Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L. Ed.2d 179 (1965), the elimination of some reporters from an area which has been voluntarily opened to other report-

ers for the purpose of news gathering presents a wholly different situation. Access to news, if unreasonably or arbitrarily denied by congressional action or publishers meeting under congressional auspices, constitutes a direct limitation upon the content of news, as recognized in Branzburg v. Hayes, 408 U.S. 665, 681, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). *See also* Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951); Washington Post Co. v. Kleindienst, 357 F.Supp. 770, *reaffirmed after remand*, 357 F.Supp. 779 (D.D.C. 1972); McCoy v. Providence Journal Co., 190 F.2d 760 (1st Cir. 1951). Certainly the exclusion of particular reporters from the news presented each morning at on-the-record press conferences, which hundreds of other reporters are eligible to attend, affects the content and quality of the news that is reported as well as access to the sources of news. Moreover, it is important to recognize that this is not a single, sporadic refusal of access. Exclusion from the press galleries constitutes a permanent disadvantage with regard to the gathering of news and has a significant impact when measured in terms of the First Amendment, both upon the publication excluded and others in similar situations. *See* Healy v. James, 408 U.S. 169, 183, 92 S. Ct. 2338, 33 L.Ed.2d 266 (1972).

There should be no glossing over what this record discloses. Under a broad, generalized congressional delegation, authority has been given certain newsmen to prevent other newsmen from having access to news of vital consequence to the public. As a result, a group of established periodical correspondents have undertaken to implement arbitrary and unnecessary regulations with a view to excluding from news sources representatives of publications whose ownership or ideas they consider objectionable. Responsible officials of the House and Senate have not forestalled such discrimination by promulgating clear eligibility requirements, *see* Cox v. Louisiana, 379 U.S. 536, 555–558, 85 S.Ct. 453, 13 L. Ed.2d 471 (1965), nor apparently have they developed any other means of checking abuse of the Association's delegated authority.

[16] The fact that the galleries for newspapermen and radio and television correspondents have operated with much greater liberality and consequent regard for the demands of the First Amendment serves simply to emphasize the arbitrariness of those managing the periodical galleries. All types of news compete and all types of publications are entitled to an equal freedom to hear and publish the official business of the Congress. Quad-City Community News Service, Inc. v. Jebens, 334 F.Supp. 8 (S.D.Iowa 1971). *Cf.* Kleindienst v. Mandel, 408 U.S. 753, 768–769, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972). If members of the Soviet press and press representatives of large, influential, politically active corporations can sit in the other press galleries, there can be no justification for excluding those who advocate the special interests of consumers from the periodical galleries.

The situation disclosed by this undisputed record flouts the First Amendment. It matters not that elements of the press as well as Congress itself appear to have been the instruments for denial of constitutional rights in this instance, for those rights limit the actions of legislative agents and instrumentalities as surely as those of Congress itself. *Cf.* Nixon v. Condon, 286 U.S. 73, 52 S. Ct. 484, 76 L.Ed. 984 (1932).

[17–20] There must be an end to this self-regulation by indefinite standards and artificial distinctions developed to censor the ownership or ideas of publications. The Constitution requires that congressional press galleries remain available to all members of the working press, regardless of their affiliation. Exclusion of a publication from the galleries can only be sanctioned under carefully drawn definite rules developed by Congress and specifically required to protect its absolute right of speech and debate or other compelling legislative interest. *See* Kovach v. Maddux, 238 F.

Supp. 835 (M.D.Tenn.1965). *Cf.* Healy v. James, *supra*, at 184–194. Such rules must, among other things, be so fashioned that due process is provided prior to exclusion, with opportunity for adequate impartial review wherever a publication is excluded. *See* Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970).

IV. *Conclusion*

The exclusion of *Consumer Reports* from accreditation to the periodical galleries of the Senate and House violates the First and Fifth Amendments to the Constitution.

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APPENDIX B

CONSUMERS UNION OF UNITED STATES, INC.

v.

PERIODICAL CORRESPONDENTS' ASSOCIATION, an unincorporated association et al., Appellants.

No. 73-2253.

United States Court of Appeals, District of Columbia Circuit.

Argued March 6, 1975.

Decided July 21, 1975.

Consumer's organization brought action against association of periodical correspondents and sergeants-at-arms of United States Senate and House of Representatives challenging refusal of association to accredit organization's publication and its designated representative to the periodical press galleries of Congress. The United States District Court for the District of Columbia, Gerhard A. Gesell, J., 365 F.Supp. 18, entered judgment for plaintiff and defendants appealed. The Court of Appeals, Christensen, Senior District Judge, held that where association acted in good faith and pursuant to express delegation of authority as aides or assistants of Congress in rejecting organization's application for admission to periodical press galleries on ground that organization's publication was not an independent publication, association's actions were immune from inquiry under the speech or debate clause, and cause was nonjusticiable.

Reversed and remanded.

1. Constitutional Law ⇐68(1)

A case may involve a nonjusticiable political question if, among other things, a textually demonstrable constitutional commitment of the issue to a coordinate political department is involved.

2. United States ⇐18

Purpose of congressional rule governing periodical press galleries is to assure that the galleries, within space limitations, will be used by bona fide reporters who will not abuse the privilege of accreditation by importuning members on behalf of private interests or causes to which lobbying or advocacy groups are committed. U.S.C.A.Const. Amend. 1; 28 U.S.C.A. § 294(d); U.S.C.A.Const. art. 1, § 5, cl. 2.

3. Constitutional Law ⇐70.1(7)

The matter of assuring independence of correspondents accredited for membership in periodical press galleries of Congress from private interests or causes to which lobbying or advocacy groups are committed is for the Congress to determine as a matter of constitutional power. U.S.C.A.Const. Amend. 1; art. 1, § 5, cl. 2; 28 U.S.C.A. § 294(d).

4. Courts ⇐281
United States ⇐12

Where periodical correspondents' association acted in good faith and pursuant to express delegation of authority as aides or assistants of Congress in refusing to accredit consumer's organization and its designated representative for membership in periodical press galleries of Congress on ground that organization's publication was not an independent publication, association's actions were within the legislative immunity granted by the speech and debate clause, and organization's challenge against actions of the association was nonjusticiable. U.S.C.A.Const. Amends. 1, 5; art. 1, § 5, cl. 2; art. 1, § 6; 28 U.S.C.A. § 294(d).

Appeal from the United States District Court for the District of Columbia —(D.C. Civil Action 1328-73).

Neil H. Koslowe, Atty., Dept. of Justice, with whom Carla A. Hills, Asst. Atty. Gen., New York City, Irving Jaffe, Acting Asst. Atty. Gen., Earl J. Silbert, U. S. Atty., and Leonard Schaitman, Atty., Dept. of Justice, were on the brief for appellants. Peter R. Reilly, Asst. U. S. Atty., also entered an appearance for appellants.

Peter H. Schuck, Washington, D. C., with whom Carol A. Cowgill, Washington, D. C., and Marvin M. Karpatkin, New York City, were on the brief for appellee.

Before MacKINNON and ROBB, Circuit Judges, and CHRISTENSEN,* Senior District Judge for the District of Utah.

Opinion for the Court filed by Senior District Judge CHRISTENSEN.

CHRISTENSEN, Senior District Judge:

This is an appeal from a declaratory judgment by which the district court held that refusal of the Executive Committee of the Periodical Correspondents' Association (Association), one of the appellants herein, to accredit appellee's *Consumer Reports* and its designated representative to the Periodical Press Galleries of the Congress of the United States was a denial of equal protection and due process, and that a portion of Rule Two of the congressional rules governing such galleries violated the freedom of the press guarantee of the First Amendment to the Constitution of the United States. Consumers Union of United States, Inc. v. Periodical Corresp. Ass'n, 365 F.Supp. 18 (D.C.D.C.1973).

The appellant Association is an unincorporated membership association composed of all periodical correspondents accredited for membership in the Periodical Press Galleries of the Congress, and the other appellants, William H. Wannall and Kenneth R. Harding, are Sergeants-at-Arms of the Senate and House of Representatives, respectively. The district court's judgment is challenged by them here because of its failure to recognize that the case was not justiciable, and upon the contention, in any event, that denial of accreditation was constitutional, reasonable and in accordance with valid internal rules of the Congress.

Consumers Union of United States, Inc. (Consumers Union) is a reputable non-profit membership organization established in 1936 to foster the interests of consumers and to provide them with information and counsel on consumer goods and services. The organization derives a substantial portion of its income from the sale of its publications, primarily its monthly magazine, *Consumer Reports*, and the bulk of its income is expended in the production of these publications. *Consumer Reports*, with a circulation of 2.2 million readers, accepts no advertising nor does it accept product samples for testing and evaluation, but it includes reports of independent product evaluations conducted at its laboratory facilities, together with news items and news analyses of general interest to consumers. At the trial the government did not contend that it was a "lobbying group",[1] among the connections along with advocacy barring admission to the galleries under the Association's interpretation[2] of the Rules Governing Peri-

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

1. Counsel for the defendants at the trial:

"[T]he distinction is, as we draw it, Your Honor, that even were the correspondents or the individuals themselves prohibited from lobbying—and we do not contend that Consumers Union or Consumers Report [sic] is a lobbying group—it certainly is not registered and I don't believe it would fall under the restrictions of Title 2 of the United States Code, but the publishers themselves in other instances, Your Honor, the distinction we would draw would be that their business is strictly publishing for profit, to operate a magazine, in other words, and disseminate the news, whereas advocacy groups such as Consumers Union—very commendably we believe—does advocate certain interests and would rather than report news would, under the guise of reporting news, be advocating the interests that they represent.

2. In a letter dated June 6, 1973, Donald E. Smith, Chairman, Executive Committee of Correspondents explained to The Honorable Howard W. Cannon, Chairman, Committee on Rules and Administration of the United States Senate, the Executive Committee's interpretation of the Rules Governing the Galleries stating: ". . . that only newsmen with no connections to any lobbying or advocacy group can properly be admitted to the galleries, for the protection of both members of Congress and disinterested organizations which publish periodicals."

odical Press Galleries, *infra*, — U.S. App.D.C. pp. ———, 515 F.2d pp. 1344–1345. However, there seems little question but that Consumers Union is a group committed to the advocacy of consumers' interests,[3] and that its *Consumer Reports* was not "published for profit and supported chiefly by advertising or by subscription, and owned and operated independently of any industry, business, association, or institution", requirements for accreditation set out in Rule 2, *infra*, and relied upon by the Association in denying appellee's application.[4]

Art. I, § 5, cl. 2 of the Constitution provides that "[e]ach House may determine the Rules of its Proceedings . . . ." Under this broad grant of authority each House has exercised power to extend to those members of the press determined eligible, and otherwise to deny, admission to the floors and galleries of Congress.

When Congress first convened in 1789, "the Legislative as well as Executive sittings of the Senate were held *with closed doors*" (1 Annals of Cong. 16 (1789)), but the House of Representatives admitted the press to the floor so they might report the debates of the House (1 Annals of Cong. 952–56 (1789)). In 1794, the Senate authorized limited access to its galleries by the public and in 1802 resolved that "any stenographer *or notetaker*, desirous to take the debates of the Senate on Legislative business, may be admitted for that purpose at such place, within the area of the Senate Chamber, as the President shall allot." (11 [7th Congress] Annals of Cong. 22 (1802 [1801–1802])). For a time thereafter, reporters were permitted on the floors of the Senate and House. This privilege apparently was abused with considerable frequency by journalists importuning Members on behalf of various claims before Congress. (Cong.Globe, 32d Cong., 2d Sess. 52 (1852)). For that reason and the growing congestion on the floors, both Houses finally enacted rules permanently removing the press from the floors of Congress. Press galleries above the floors were eventually established and in 1888 the Senate (Cong.Directory, 50th Cong., 1st Sess. 160 (1888)), and 1916 the House (53 Cong.Rec. 1214 (1916)), entrusted their management to a Standing Committee of Correspondents.

Regulations governing the management of the galleries, now separated into the Press Galleries, Radio and Television Correspondents' Galleries, Periodical Press Galleries, and Press Photographers'

3. The charter of Consumers Union states that its purposes are to provide consumers with information and counsel on consumer goods and services, to give information on all matters relating to the expenditure of the family income, and to initiate and to cooperate with individuals and group efforts seeking to create and maintain decent living standards. Affidavit of Mr. Colston E. Warne, President of Consumers Union of United States, Inc.: "Consumers Union occasionally responds to invitations from Congressional committees to present its views on consumer issues. When Consumers Union takes positions on public issues, it does so on behalf of consumers generally and/or on behalf of its members in their roles as consumers.

". . . Consumers Union occasionally presents its views on consumer issues to Federal administrative agencies on behalf of consumers generally and/or on behalf of its members in their roles as consumers, but has never pressed 'claims' or sought to promote any narrow organizational interest of Consumers Union. For example, Consumers Union has petitioned the Food and Drug Administration concerning labeling requirements for food products, and frequently submits comments on proposed agency rules where public comment has been solicited."

4. Initial notification of the decision was accompanied by a form stating that the reason for the rejection was that *Consumer Reports* was "[n]ot an independent publication" as required by rule 2. Shortly thereafter this reason was elaborated upon in a letter to the appellee from the Chairman of the Executive Committee of the Association:

"The Executive Committee which rejected the application did so under the rules that are laid down by the Senate and by the Speaker of the House. Under the existing rules, we simply are unable to accredit Consumers' Reports.

"Under section 2 of the rules, no publication shall be accredited unless it is 'owned and operated independently of any industry, business, association or institution.' It is apparent that Consumers' Reports is disqualified under this rule."

Gallery, are promulgated by Congress, which retains the right of final approval of applications for admission to the galleries. The House and Senate Periodical Press Galleries are governed by identical rules published in the Congressional Directory and signed by the Speaker of the House of Representatives and by the Chairman of the Senate Committee on Rules and Administration.

Rule XXXIV, ¶2 of the Standing Rules of the Senate,[5] and Rule XXXIV, ¶2 of the Rules of the House of Representatives,[6] *authorize the adoption of rules governing the press galleries.* For this purpose the Senate Committee on Rules and Administration adopted Rules for Regulation of Senate Wing, Periodical Press Gallery, published in the Senate Manual, 93d Cong., 1st Sess., 1973, pp. 125–27, similar rules being jointly adopted by the House and Senate and published in the Congressional Directory, 93d Cong., 1st Sess., 1973, pp. 916–17. Slight variations between the rules as published in the Senate Manual and the Congressional Directory are not deemed material to our decision. The pertinent portions of the Rules Governing Periodical Press Galleries as jointly published in the Congressional Directory are as follows:

> "1. Persons desiring admission to the Periodical Press Galleries of Congress shall make application to the Speaker, as required by rule XXXIV of the House of Representatives, and to the Committee on Rules and Administration of the Senate, as required by rule VI for the regulation of the Senate wing of the Capitol; and shall state in writing the names of all newspapers or publications or news associations by which they are employed, and what other occupation or employment they may have, if any; and they shall further declare that they are not engaged in the prosecution of claims pending before Congress or the departments, and will not become so engaged while allowed admission to the galleries; that they are not employed in any legislative or executive department of the Government, or by any foreign government or any representatives thereof; and that they are not employed, directly or indirectly, by any stock exchange, board of trade, or other organization, or member thereof, or brokerage house or broker, engaged in the buying and selling of any security or commodity, or by any person or corporation having legislation before Congress, and will not become so engaged while retaining membership in the galleries. . . ."
>
> "2. The applications required by rule 1 shall be authenticated in a manner that shall be satisfactory to the executive committee of the Periodical Correspondents' *Gallery* who shall see that the occupation of the galleries is confined to bona fide and accredited resident correspondents, *newsgatherers*, or reporters of reputable standing who represent one or more periodicals which regularly publish a substantial volume of news material of either gen-

5. "They [the Committee on Rules and Administration] shall make such regulations respecting the reporters' galleries of the Senate, together with the adjoining rooms and facilities, as will confine their occupancy and use to bona fide reporters for daily newspapers and periodicals, to bona fide reporters of news or press associations requiring telegraph service to their membership, and to bona fide reporters for daily news dissemination through radio, wire, wireless, and similar media of transmission. These regulations shall so provide for the use of such space and facilities as fairly to distribute their use to all such media of news dissemination." Rule VI of the Rules for Regulation of Senate Wing is the result of this directive and, as relates to the Periodical Press Galleries, tracks the "Rules Governing Periodical Press Galleries".

6. "Such portion of the gallery over the Speaker's chair as may be necessary to accommodate representatives of the press wishing to report debates and proceedings shall be set aside for their use, and reputable reporters and correspondents shall be admitted thereto under such regulations as the Speaker may from time to time prescribe; and the supervision of such gallery, including the designation of the employees, shall be vested in the standing committee of correspondents, subject to the direction and control of the Speaker.

eral or of an economic, industrial, technical, or trade character, published for profit and supported chiefly by advertising, and owned, and operated independently of any industry, business, association, or institution; and it shall be the duty of the executive committee at their discretion to report violation of the privileges of the galleries to the Speaker, or to the Senate Committee on Rules and Administration, and pending action thereon the offending correspondent may be suspended.

. . . . .

"5. The Periodical Press Galleries shall be under the control of an executive committee elected by members of the Periodical Correspondents' Association, subject to the approval and supervision of the Speaker of the House of Representatives and the Senate Committee on Rules and Administration."

Appellant Periodical Correspondents' Association, alluded to in the above rules, was created to administer the Periodical Press Galleries. It consists of employees of publications which have been accredited to the Periodical Press Galleries by the Association's Executive Committee. The duties of the Executive Committee, an elected body of seven members, are to accredit applicant publications and to issue credentials to members.[7] The final authority on applications for membership is lodged in the Speaker of the House of Representatives and the Senate Committee on Rules and Administration. The Sergeant at Arms of the United States Senate is charged under Rule I of the Rules for Regulation of the Senate Wing of the United States Capitol with "enforcement of all rules made by the Committee on Rules and Administration for the regulation of the Senate wing of the Capitol." The Sergeant at Arms of the United States House of Representatives is similarly charged with maintaining order under the direction of the Speaker of the House.[8]

In November, 1972, appellee's Washington editor of *Consumer Reports* applied to the Periodical Correspondents' Association seeking accreditation of *Consumer Reports* to the Periodical Press Galleries of Congress. Accreditation by the Association provides members with certain privileges including special seating in the galleries, a variety of other facilities including telephones and typewriters in a room adjacent to the press galleries, entrance to the Senate Presidents' Room and House Speakers' Lobby, admission to the on-the-record daily press conferences held by the Senate leadership and the Speaker of the House, and facilitation of access to press conferences at the White House and administrative agencies.

Consumers Union's application for admission to the Periodical Press Galleries was rejected as heretofore noted by the Executive Committee on January 9, 1973, for the reason that *Consumer Reports* was "[n]ot an independent publication", as required by Rule Two of the Rules Governing Periodical Press Galleries. Upon review of this decision, the Chairman of the Committee on Rules and Administration of the Senate on June 14, 1973, advised Consumers Union that the Committee would abide by the previous decision.[9]

Appellee then brought the action below for declaratory relief, alleging that the Rules Governing Periodical Press

7. Affidavit of Donald E. Smith, Chairman of the Executive Committee of Correspondents of the Periodical Correspondents' Association.

8. It is not necessary to consider the situation of the Sergeants at Arms separately from that of the Association. Manifestly, if performing legislative acts, the Sergeants at Arms would have immunity at least equal to that of the Association, and there is no claim that they took any affirmative action against appellee or did anything more than acquiesce in the decision of the Association.

9. On May 18, 1973, appellee wrote to the Speaker of the House of Representatives requesting intervention on its behalf. No response has been received by appellee as far as disclosed by the record.

Galleries are unconstitutional both on their face and as applied to *Consumer Reports*. Appellee contended, more particularly, that Rule Two constituted a prior restraint upon, and otherwise abridged, its rights to gather, have full access to, and report to its readers upon, news concerning Congress and of a public nature, in violation of appellee's rights under the First Amendment, and that in denying accreditation to *Consumer Reports* the Association acted in a discriminatory, arbitrary, capricious, and unreasonable manner, thus violating Consumers Union's rights under the Fifth Amendment.

Both sides moved for summary judgment. On October 11, 1973, the court entered a declaratory judgment in favor of appellee. It determined that the case was justiciable, that legislative immunity by virtue of the Speech or Debate Clause did not attach to the appellants who were non-members of Congress, and that the portion of Rule Two as interpreted by the Executive Committee of the Association to exclude the advocatory press was arbitrary, capricious and unreasonable, and constituted abridgment of freedom of the press, denial of equal protection of the laws, and deprivation of liberty and property without due process of law.[10]

We need not reach other issues, for we agree with appellants that this case is nonjusticiable.

Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), teaches that at least two determinations must be made to sustain justiciability:

> "First, we must decide whether the claim presented and the relief sought are of the type which admit of judicial resolution. Second, we must determine whether the structure of the Federal Government renders the issue presented a 'political question'—that is, a question which is not justiciable in federal court because of the separation of powers provided by the Constitution." 395 U.S. at 516–17, 89 S.Ct. at 1961.[11]

Regardless of whether our conclusion could lie wholly within the scope of the second inquiry, we are of the opinion that this case is nonjusticiable because it involves matters committed by the Constitution to the Legislative Department and as to which the acts of the appellants, under the circumstances, did not breach the limits of legislative immunity.

We need not follow point by point the arguments of the parties concerning freedom of the press and of association. Although we have been mindful of these, as well as of the underlying legislative premise pursuant to which the association acted, it has become apparent that this is a case in which "it is unnecessary to engage in any delicate balancing of . . . [legislative consideration] against the legitimate demands of the First Amendment." Saxbe v. Washington Post Co., 417 U.S. 843, 849, 94 S.Ct. 2811, 2814, 41 L.Ed.2d 514 (1974). Cf. Los Angeles Free Press, Inc. v. City of Los Angeles, 9 Cal.App.3d 448, 88 Cal. Rptr. 605 (1970), cert. denied, 401 U.S. 982, 91 S.Ct. 1193, 28 L.Ed.2d 334 (1971). See also Eastland v. United States Servicemen's Fund, —— U.S. ——, 95 S.Ct. 1813, 43 L.Ed.2d 324 (No. 73–1923, 1975), *supra*. The accreditation policy here did not place the appellee in any less adv

10. Plaintiff-appellee moved below to amend the judgment to require the Association to accredit *Consumer Reports* to the Periodical Press Galleries pending defendants' appeal, the motion being denied. Its applications for injunction pending appeal subsequently were denied without opinion by a panel of this court and by the Chief Justice.

11. In similar view this court in United States Servicemen's Fund v. Eastland, 159 U.S.App. D.C. 352, 488 F.2d 1252 (1973), rev'd on other grounds, sub nom., Eastland v. United States Servicemen's Fund, —— U.S. ——, 95 S.Ct. 1813, 43 L.Ed.2d 324 (No. 73–1923, 1975), ed that there are:

> ". . . two limitations upon the exer of judicial power: (1) Is the question pres ed in an adversary context and in a form historically viewed as capable of resol through the judicial process? and (2) Has lution of the question been entrusted judiciary under the Constitution?"

tageous position than the public or the press generally; limitations were based upon distinctions applied to it as well as to others in similar situations; appellants as we shall see were agents acting within the sphere of legitimate legislative activity; beyond declining to accredit *Consumer Reports*, none of the appellants took any action or enforced any orders against appellee, and the internal rules involved constituted a demonstrable constitutional commitment to the legislative branch of government. Cf. Powell v. McCormack, *supra*. While we do not reach the merits of appellee's claim that its constitutional rights have been impaired, this assurance that the action in question is not so facially violative of constitutional guarantees as to commend reexamination of established principles concerning justiciability in the particular context of this case avoids the necessity of further extending this opinion.

[1] A case may involve a nonjusticiable political question if, among other things, "a textually demonstrable constitutional commitment of the issue to a coordinate political department" is involved. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

United States v. Ballin, 144 U.S. 1, 5, 12 S.Ct. 507, 509, 36 L.Ed. 321 (1892), deals with power committed to Congress to "determine the Rules of its Proceedings" by virtue of Art. I, § 5:

"The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there must be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."

[2, 3] It is quite apparent from the text of the rule in question in light of legislative history that its purpose is to assure that the Periodical Press Galleries, within space limitations, will be used by *bona fide* reporters who will not abuse the privilege of accreditation by importuning Members on behalf of private interests or causes to which lobbying or advocacy groups are committed. The manner of assuring independence of those accredited from such groups or interests is for the Congress to determine as a matter of constitutional power.[12]

Such power over the internal proceedings of the Congress in itself would appear to establish the nonjusticiability of this cause were it not for the contention that Rule 2 and its interpretation by the Association infringed upon appellee's

[12] The rules governing access to the galleries historically have incorporated some form of prohibition against the admission of persons who might importune Congressmen on behalf of private interests as has been seen. The present Rules Governing Press Galleries require correspondents to certify that "he or she is not engaged in paid publicity or promotion work" nor "in any lobbying activity". Cong. Directory, 94th Cong., 1st Sess., at 871 (1975). The same is required of photographers under the Rules Governing Press Photographers' Gallery. *Id.*, at 911. And radio and television correspondents must certify not only that they are not engaged in "lobbying" but also that they are not engaged in the "promotion of legislation pending before Congress,. the Departments, or the independent agencies." *Id.*, at 923. When the Periodical Press Galleries were established in 1941, the Rules Governing Periodical Press Galleries to similar effect provided that all periodicals desiring admission be "owned and operated independently of any industry, business, association, or institution". Cong. Directory, 77th Cong., 1st Sess. 740 (1941). This provision is retained in Rule 2 of the present version of those rules. Cong. Directory, 94th Cong., 1st Sess. 938–939 (1975).

constitutional rights and therefore a question proper for judicial consideration necessarily is presented.[13] We need not pause to consider such a formulation in the abstract, but turn to the effect of the Speech or Debate Clause[14] to settle whether despite the claim of constitutional violation, tenuous as we have noted or otherwise, this case is yet nonjusticiable.

The problem here is twice removed from United States v. Brewster, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972), and United States v. Johnson, 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966), although the discussions there of governing principles, which need not be repeated, illuminate the solution. Here we are not concerned with claimed bad faith or illegal conduct. We are dealing in effect with "acts that occur in the regular course of the legislative process," *Brewster*, 408 U.S. at 525, 92 S.Ct. at 2544, although perhaps not with the legislative process itself. And we are concerned within the scope of that process with internal rules of the Congress.[15] Although the related immunity afforded by the Clause to Members of Congress appears plain, it is questioned by appellee, on reasoning similar to that of the court below,[16] that it protects the Periodical Correspondent's Association and the Sergeants at Arms of the House and Senate.

The Supreme Court came to grips with a variation of the problem in Gravel v. United States, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). An aide of Senator Gravel was subpoenaed by the Grand Jury for questioning with relation to the introduction into a subcommittee report and private publication of the "Pentagon Papers" and the Speech or Debate Clause immunity was invoked. Mr. Justice White, writing for the court states:

> "We have little doubt that we are neither exceeding our judicial powers nor mistakenly construing the Constitution

13. Appellee relied primarily upon the statements in United States v. Ballin, 144 U.S. 1, 5, 12 S.Ct. 507, 509, 36 L.Ed. 321 (1892), *supra*, that "[Congress] may not by its rules ignore constitutional restraints or violate fundamental rights . . . ."

14. Art. I, § 6: "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their Respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

15. While point is made by appellee of the collateral benefits accruing to correspondents as a result of accreditation to the Periodical Press Galleries, it has not been suggested that if refusal of such accreditation, as such, were proper otherwise, it would become improper by reason of these related privileges. On the other hand, these collateral benefits emphasize the relationship of accreditation to purely internal matters and machinery of the Congress.

16. The trial court considered the "internal rule" and the "immunity" aspects as entirely separate. It disposed of the first by stating: "Although the courts will not normally interfere with the manner in which Congress chooses to regulate its internal procedures, it is well established that a congressional rule which infringes upon the constitutional rights of persons other than Congressmen presents a proper question for the judiciary", citing the dissenting opinions in Yellin v. United States, 374 U.S. 109, 143-144, 83 S.Ct. 1828, 10 L.Ed.2d 778, and United States v. Ballin, 144 U.S. 1, 5, 12 S.Ct. 507, 36 L.Ed. 321. We do not read these cases so broadly; particularly we do not think their teaching is that in determining the justiciability of constitutional claims the merits of those claims is necessarily to be assumed or determined in a case such as this. As to immunity, the lower court held that in the absence of an affirmative showing by appellees "that if members of the press whose publications advocate a particular point of view are admitted to the galleries, congressional proceedings will be impeded or disrupted . . . It must be concluded that the Speech and Debate Clause does not shield the defendants from a challenge to their admission policies." No matter what argument for such a conclusion might be made in different and isolated context, we think that in connection with execution of an internal rule of Congress with the broad justification so apparent here, it was unwarranted to presume a non-legislative purpose as against which the burden must be upon appellants to particularize grounds as a condition for immunity under the Speech or Debate Clause.

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by holding that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." 408 U.S. at 618, 92 S.Ct. at 2623.

Kilbourn v. Thompson, 103 U.S. 168, 26 L.Ed. 377 (1881); Dombrowski v. Eastland, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967), and Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), *supra*, were distinguished on the ground that these involved questions of illegal conduct.

In Doe v. McMillan, 412 U.S. 306, 320, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973), it is indicated that immunity would be extended not only to Members sitting on a congressional committee, and to the staff, consultant and investigator of the committee, but to the Public Printer and Superintendent of Documents had they been engaged in legislative functions. Employing the *Gravel* test it still must be determined whether the particular acts considered here would qualify for immunity if performed by a Member himself.

In *Kilbourn*, 103 U.S. at 204–5, the court stated:

> "It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it."

In *Gravel*, 408 U.S. at 625, 92 S.Ct. at 2627, the court further explained:

> "Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative communicative processes by w , Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but 'only when necessary to prevent indirect impairment of such deliberations.' United States v. Doe, 455 F.2d, at 760."

In United States v. Brewster, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972), *supra*, the scope of the Clause was examined in the context of the prosecution on bribery charges of a former United States Senator; it was found that immunity did not attach. Acknowledging the possibly broad interpretation to which *Kilbourn* and *Johnson* might be subjected—especially the language of *Johnson* that all conduct "related to the due functioning of the legislative process" may be included in the Clause—the Court distinguished

> ". . . a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress. . . . Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things 'generally done in a session of the House by one of its members in relation to the business before it,' Kilbourn v. Thomp-

son, *supra*, 103 U.S. at 204, [26 L.Ed. 377,] or things 'said or done by him as a representative, in the exercise of the functions of that office,' Coffin v. Coffin, 4 Mass. 1, 27 (1808). . . . only acts generally done in the course of the process of enacting legislation were protected."

Decided the same day as *Brewster*, *Gravel* further focused the scope of the "legislative process" upon integral parts of the deliberative and communicative process with respect to the consideration and passage or rejection of proposed legislation. As part of the explanation, we think presaging the present situation, the Court included as within the reach of the Clause "matters which the Constitution places within the jurisdiction of either House". Doe v. McMillan, 412 U.S. at 317, 93 S.Ct. at 2027, *supra*, held that the Public Printer and Superintendent of Documents would be protected in internal distribution of documents to Members of Congress, but that "general, public distribution beyond the halls of Congress . . . and beyond the apparent needs of the '*due* functioning of the [legislative] process', United States v. Brewster, 408 U.S. 516, 92 S.Ct. 2531, 33 L.Ed.2d 507," was not protected. But the Court in its most recent interpretation of the clause has emphasized the absoluteness of its bar when the sphere of legislative activity is involved as well as the necessity of a broad reading to effectuate its purposes. Eastland v. United States Servicemen's Fund, —— U.S. ——, 95 S.Ct. 1813, 43 L.Ed.2d 324 (No. 73–1923, 1975).

[4] There can be no reasonable contention that appellants were acting in a private capacity or not pursuant to rules validly enacted by Congress. It is conceded that they were acting in good faith. It is evident in view of Doe v. McMillan, *supra*, that they were occupying those types of positions to which immunity could attach if they were engaged in protected legislative activity. For many years the Congress itself had directly controlled the seating of the press within its halls. The increasing complexities of legislative processes rendered it entirely proper for the delegation of the day to day control of the galleries to "aids and assistants". See *Gravel*, 408 U.S. at 616–618, 92 S.Ct. 2614. Appellants were acting by virtue of an express delegation of authority as aides or assistants of Congress. If their actions would have been immune from inquiry under the Speech or Debate Clause had they been performed by Members of Congress, the same immunity would attach to appellants.

Although to the extent that they participated in the administration of the galleries appellants were not engaged in the consideration and passage or rejection of proposed legislation, *Gravel* at 625, 92 S.Ct. 2614, neither were they performing acts analogous to unlawful arrest, *Kilbourn*, 103 U.S. at 200, 26 L.Ed. 377, private publication of government documents, *Gravel*, 408 U.S. at 625, 92 S.Ct. 2614, nor engaging in political activities, *Brewster*, 408 U.S. at 512, 92 S.Ct. 2531. They were enforcing internal rules of Congress validly enacted under authority specifically granted to the Congress and within the scope of authority appropriately delegated by it. They were engaging in a sense in acts generally done in relation to the business before Congress, cf. *Kilbourn*, 103 U.S. at 204, 26 L.Ed. 377, "an integral part of the deliberative and communicative processes", *Gravel*, 408 U.S. at 625, 92 S.Ct. at 2627. They fell within "the sphere of legislative activity", Eastland v. United States Servicemen's Fund, *supra*, 95 S.Ct. at 1813. Rule 5, *supra*, —— U.S.App.D.C. at ——, 515 F.2d at 1345, provided that the Executive Committee's actions are "subject to the approval and supervision of the Speaker of the House of Representatives and the Senate Committee on Rules and Administration." The Association's interpretation of the rules was approved expressly by the Senate Committee and at least acquiesced in on the House side. The Association was performing delegated legislative functions; in fact these were an integral part of the legislative machinery. There would be neither justifi-

cation nor authority for the courts to enforce judicial views as to how the rule could be better drafted to accomplish its purposes. Cf. United States v. Smith, 286 U.S. 6, 52 S.Ct. 475, 76 L.Ed. 954 (1932).

By reason of circumstances peculiar to this case, we find it unnecessary and, indeed, improper to consider the constitutional commitment of power over internal rules to the Congress and the Congressional immunity by virtue of the Speech or Debate Clause in isolation from each other. The execution of internal rules is so identified with the legislative process as to lend additional force to the historic legislative treatment of the subject of the rule in question. We conclude that the activity of appellants was within the anticipations of *Gravel* when, in delineating legislative acts, it was said that in addition to the direct business of passage or rejection of proposed legislation, the Clause applied to "other matters which the Constitution places within the jurisdiction of either House," 408 U.S. at 625, 92 S.Ct. at 2627. Appellants say that "it is unnecessary to speculate as to whether this action would have been protected under the Speech or Debate Clause *if* it had been performed by Members of Congress because the identical action *was* performed by Members of Congress," through adoption of appellant's action by the Senate Committee on Rules and Administration. Whether a clearly non-legislative decision made by non-members would be immunized from judicial scrutiny when ratified expressly by Members of Congress need not be decided in the context of this case. Cf. Powell v. McCormack, *supra*. We are content to rest our ruling that this cause is not justiciable upon the ground that, performed in good faith, the acts of appellants were within the spheres of legislative power committed to the Congress and protected by the legislative immunity granted by the Constitution. But the fact that they were ratified by the Senate Committee and at least acquiesced in by the Speaker of the House not only is supportive of their occurrence within the scope of the legislative process but indicative that they were of a nature which the legislative judgment regarded proper.

The judgment of the district court is reversed, and the case remanded with direction for its dismissal as one not justiciable by reason of the textually demonstrable commitment of such rules to the legislative branch of government and in view of immunity conferred by the Speech or Debate Clause of the Constitution.

Reversed and remanded.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-590

CONSUMERS UNION OF UNITED STATES, INC.,
PETITIONER

v.

PERIODICAL CORRESPONDENTS' ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11a-21a) is reported at 515 F.2d 1341. The opinion of the district court (Pet. App. 1a-10a) is reported at 365 F. Supp. 18.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1975. The petition for a writ of certio-

rari was filed on October 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the decision by Congress, acting in accordance with its internal rules, to reject an unqualified applicant for admission to its press galleries is reviewable in a suit brought against congressional functionaries who recommended the decision.

CONSTITUTIONAL PROVISIONS AND CONGRESSIONAL RULES INVOLVED

Article I, Section 5, Clause 2 provides:

> Each House may determine the Rules of its Proceedings * * *.

Article I, Section 6, Clause 1 provides:

> [F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.

Rule XXXIV, Rules and Manual of the United States Senate (1973), provides:

> [The Senate Committee on Rules and Administration] shall make such regulations respecting the reporters' galleries of the Senate, together with the adjoining rooms and facilities, as will confine their occupancy and use to bona fide reporters for daily newspapers and periodicals, to bona fide reporters of news or press associations requiring telegraph service to their membership, and to bona fide reporters for daily news dissemination through radio, wire, wireless, and

similar media of transmission. These regulations shall so provide for the use of such space and facilities as fairly to distribute their use to all such media of news dissemination.

Rule XXXIV, Rules of the House of Representatives (1975), provides:

> Such portion of the gallery over the Speaker's chair as may be necessary to accommodate representatives of the press wishing to report debates and proceedings shall be set aside for their use, and reputable reporters and correspondents shall be admitted thereto under such regulations as the Speaker may from time to time prescribe; and the supervision of such gallery, including the designation of its employees, shall be vested in the standing committee of correspondents, subject to the direction and control of the Speaker; * * *.

Rules Governing Periodical Press Galleries provide: [1]

> 1. Persons desiring admission to the Periodical Press Galleries of Congress shall make application to the Speaker, as required by rule XXXIV of the House of Representatives, and to the Committee on Rules and Administration of the Senate, as required by rule VI for the regulation of the Senate wing of the Capitol; and shall state in writing the names of all newspapers or publications or news associations by which they are employed, and what other occu-

[1] These Rules are published in the Congressional Directory, 94th Cong., 1st Sess. 938-939 (1975).

pation or employment they may have, if any; and they shall further declare that they are not engaged in the prosecution of claims pending before Congress or the departments, and will not become so engaged while allowed admission to the galleries; that they are not employed in any legislative or executive department of the Government, or by any foreign government or any representatives thereof; and that they are not employed, directly or indirectly, by any stock exchange, board of trade, or other organization, or member thereof, or brokerage house or broker, engaged in the buying and selling of any security or commodity, or by any person or corporation having legislation before Congress, and will not become so engaged while retaining membership in the galleries. Holders of visitor's cards who may be allowed temporary admission to the galleries must conform to the restrictions of this rule.

2. The applications required by rule 1 shall be authenticated in a manner that shall be satisfactory to the executive committee of the Periodical Correspondents' Gallery who shall see that the occupation of the galleries is confined to bona fide and accredited resident correspondents, news-gatherers, or reporters of reputable standing who represent one or more periodicals which regularly publish a substantial volume of news material of either general or of an economic, industrial, technical or trade character, published for profit and supported chiefly by advertising or by subscription, and owned and operated independently of any industry, business, association, or institution; and it shall be the duty of the executive committee at their discretion to

report violation of the privileges of the galleries to the Speaker, or to the Senate Committee on Rules and Administration, and pending action thereon the offending correspondent may be suspended.

3. Persons engaged in other occupations whose chief attention is not given to the gathering or reporting of news for periodicals requiring such continuous service shall not be entitled to admission to the Periodical Press Galleries. The Periodical Correspondents' list in the CONGRESSIONAL DIRECTORY shall be a list only of persons whose chief attention is given to such service for news periodicals, as described in rule 2, except that admission shall not be denied if his other work is such as to make him eligible to the Press Galleries or Radio Correspondents' Galleries.

4. Members of the families of correspondents are not entitled to the privileges of the galleries.

5. The Periodical Press Galleries shall be under the control of an executive committee elected by members of the Periodical Correspondents' Association, subject to the approval and supervision of the Speaker of the House of Representatives and the Senate Committee on Rules and Administration.

STATEMENT

The facts of this case are not disputed. Petitioner "is a reputable non-profit membership organization established in 1936 to foster the interests of consumers and to provide them with information and counsel on consumer goods and services" (Pet. App. 12a).

The organization "occasionally responds to invitations from Congressional committees to present its views on consumer issues" and "occasionally presents its views on consumer issues to Federal administrative agencies" (Pet.App. 13a, n. 3). It "derives a substantial portion of its income from the sale of its * * * monthly magazine, *Consumer Reports*," which "includes reports of independent product evaluations conducted at its laboratory facilities, together with news items and news analyses of general interest to consumers" (*id.* at 12a).

Respondent Periodical Correspondents' Association is "an unincorporated membership association composed of all periodical correspondents accredited for membership in the Periodical Press Galleries of the Congress" (Pet. App. 12a). The periodical press galleries, and three other congressional press galleries,[2] are supervised by the Senate Committee on Rules and Administration and the Speaker of the House of Representatives, pursuant to authority delegated to them by Rule XXXIV of the Standing Rules of the Senate and Rule XXXIV of the Rules of the House of Representatives (*id.* at 13a-15a). Under the "Rules Governing Periodical Press Galleries" jointly promulgated by the Chairman of the Senate Rules Committee and the Speaker of the House, the Periodical Correspondents' Association, through an elected executive committee, administers the periodical press

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[2] The other galleries are the Press Galleries, the Radio and Television Correspondents' Galleries, and the Press Photographers' Galleries.

galleries on a day-to-day basis subject to the approval of the Senate Rules Committee and the Speaker of the House (Pet.App. 13a-15a). Admission to the galleries entails certain privileges, such as "special seating in the galleries, a variety of other facilities including telephones and typewriters in a room adjacent to the press galleries, entrance to the Senate Presidents' Room and House Speakers' Lobby, admission to the on-the-record daily press conferences held by the Senate leadership and the Speaker of the House, and facilitation of access to press conferences at the White House and administrative agencies" (*id.* at 15a).

In November 1972, the Washington, D.C., editor of *Consumer Reports* applied to the Senate Rules Committee and the Speaker of the House of Representatives for the admission of the magazine's correspondents to the periodical press galleries (Pet. App. 15a). The application was accompanied by a certification that it "conforms to the rules of the Periodical Press Galleries as approved by the Speaker of the House of Representatives and the Senate Committee on Rules" (App. 11).[3] It was tendered to the executive committee of the Periodical Correspondents' Association, in accordance with Rule 2 of the "Rules Governing Periodical Press Galleries." On January 9, 1973, the executive committee informed the editor that *Consumer Reports*' application could not be accepted because it was "[n]ot an independent publication," as required by Rule 2 (Pet. App. 15a). In a

[3] "App." refers to the joint appendix filed in the court of appeals.

letter to petitioner, dated January 29, 1973, the chairman of the executive committee explained that the committee's action was dictated by the controlling provisions of the rules promulgated by the Senate Committee on Rules and Administration and the Speaker of the House of Representatives, which bar any publication, such as *Consumer Reports*, which is not "owned and operated independently of any industry, business, association or institution" (App. 14; Pet. App. 13a, n.4).

On May 18, 1973, petitioner wrote to the Chairman of the Senate Committee on Rules and Administration (Senator Howard W. Cannon) and the Speaker of the House of Representatives (Representative Carl Albert) and requested that they "exercise [their] authority under Rule 5 of the Rules Governing Periodical Press Galleries" and grant *Consumer Reports'* application (App. 16-22; Pet. App. 15a, n. 9). The Chairman of the Senate Rules Committee, by letter dated May 23, 1973, informed petitioner that he would solicit the comments and recommendations of the chairman of the executive committee of the Periodical Correspondents' Association and the Sergeant-at-Arms of the Senate and that as soon as those comments and recommendations were received the matter would be considered by the Senate Rules Committee (App. 23).

On June 6, 1973, the chairman of the executive committee advised Senator Cannon that since " 'Consumer Reports' is published by Consumers Union, a non-profit organization which is a self-proclaimed ad-

vocate of consumer interests and, among other activities, testifies before Congressional committees in behalf of the interests of consumers, as Consumers Union judges those interests," the executive committee believed it was barred from the periodical press galleries by Rule 2 of the "Rules Governing Periodical Press Galleries," under which "only newsmen with no connections to any lobbying or advocacy group can properly be admitted to the galleries, for the protection of both members of Congress and disinterested organizations which publish periodicals" (App. 26-27; Pet. App. 12a, n. 2). On June 8, 1973, the Sergeant-at-Arms of the Senate informed the Chairman of the Senate Rules Committee that he concurred in the comments of the chairman of the executive committee of the Periodical Correspondents' Association (App. 25).

On June 13, 1973, at the regular meeting of the Senate Rules Committee, the matter of *Consumer Reports'* application was placed on the agenda and discussed (App. 24). At the conclusion of the discussion, the Senate Rules Committee decided that the application should be denied. On June 14, 1973, the Chairman of the Senate Rules Committee advised petitioner in writing of the Committee's decision (*ibid.*).[4]

Petitioner commenced this action for declaratory relief in the district court on July 3, 1973 (Pet. 8).

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[4] The Speaker of the House of Representatives did not respond separately to petitioner's letter of May 18, 1973 (Pet. App. 15a, n. 9; 21a).

Petitioner asserted in its complaint that the "Rules Governing Periodical Press Galleries" were unconstitutional as a prior restraint on petitioner's First Amendment rights (Pet. 8-9). Petitioner also asserted that respondents had acted arbitrarily and capriciously, in violation of petitioner's rights under the Fifth Amendment, in denying *Consumer Reports'* application for admission to the periodical press galleries (*id.* at 9).

On October 11, 1973, the district court entered judgment in favor of petitioner (App. 119) and filed a memorandum opinion (Pet. App. 1a-10a). The district court recognized that it could not reach the merits of petitioner's action if that action were barred by the Speech and Debate Clause (*id.* at 7a). It also recognized that the Clause protects congressmen and their agents from having to defend in court actions undertaken as " 'an integral part of the deliberative and communicative processes by which Members participate in [congressional] proceedings with respect to consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." The court found, moreover, that respondents were "undoubtedly congressional agents acting at the specific behest of Congress and pursuant to its rules" (*id.* at 7a).

Nevertheless, the district court held that because respondents had failed to show that "congressional proceedings will be impeded or disrupted" by the admission of *Consumer Reports* to the periodical press galleries, the Speech and Debate Clause did

not apply (Pet. App. 7a). The court then proceeded to declare, on the merits, that the portion of Rule 2 of the "Rules Governing Periodical Press Galleries" that bars periodicals not "owned and operated independently of any industry, business, association, or institution" violated the free press guarantee of the First Amendment, and that the rejection of *Consumer Reports*' application violated petitioner's rights under the First and Fifth Amendments (App. 119; Pet. App. 8a-10a).

The court of appeals reversed and remanded. The court observed that, under the "broad grant of authority" provided by Article I, Section 5, Clause 2 of the Constitution,[5] Congress has long determined which members of the press are eligible for admission to its floors and galleries (Pet. App. 13a, 17a). The court noted further that "[f]or many years the Congress itself had directly controlled the seating of the press within its halls," but that "[t]he increasing complexities of legislative processes rendered it entirely proper for the delegation of the day to day control of the galleries to 'aids and assistants'" (*id.* at 20a). Since respondents "were acting by virtue of an express delegation of authority as aides or assistants of Congress," and since it was "conceded that they were acting in good faith," the court concluded that if the denial of *Consumer Reports*' application for admission to the periodical press galleries would have been

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[5] Article I, Section 5, Clause 2 provides that "[e]ach House may determine the Rules of its Proceedings * * *."

immune from judicial inquiry under the Speech and Debate Clause if performed by Members of Congress, respondents were entitled to the same immunity (Pet. App. 20a).

The court then went on to examine respondents' actions and found that they were legislative in nature (Pet. App. 20a):

> [Respondents] were enforcing internal rules of Congress validly enacted under authority specifically granted to the Congress and within the scope of authority appropriately delegated by [them]. They were engaging in a sense in acts generally done in relation to the business before Congress, * * * "an integral part of the deliberative and communicative processes" * * *. They fell within "the sphere of legislative activity" * * *. * * * The Association's interpretation of the rules were approved expressly by the Senate Committee and at least acquiesced in on the House side. The Association was performing delegated legislative functions; in fact these were an integral part of the legislative machinery.

The court of appeals therefore held that the Speech and Debate Clause made this action nonjusticiable. Because of the basis of its holding, the court found it unnecessary to balance legislative considerations against petitioners' First and Fifth Amendments claims, beyond noting that petitioner had not been placed "in any less advantageous position than the public or the press generally; limitations were based upon distinctions applied to it as well as to others in similar situations" (Pet. App. 16a-17a). It also

found "neither justification nor authority * * * to enforce judicial views as to how [Rule 2] could be better drafted to accomplish its purposes" (Pet. App. 20a-21a).

ARGUMENT

The decision of the court of appeals is correct and represents simply the application of constitutional principles recently reaffirmed by this Court to the particular facts of this case. Thus, further review is unwarranted.

In *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, this Court comprehensively reviewed the purpose and scope of the Speech and Debate Clause and reaffirmed the constitutional principles that control this case. First, the Court admonished that the Speech and Debate Clause must be read "broadly to effectuate its purposes." *Id.* at 501. Next, the Court reaffirmed its prior holdings in *Doe* v. *McMillan*, 412 U.S. 306, and *Gravel* v. *United States*, 408 U.S. 606, that the Clause protects congressional aides, assistants, and functionaries (such as the Public Printer and the Superintendent of Documents) to the extent that they perform acts within the legitimate legislative sphere. 421 U.S. at 507. The Court also explicitly rejected the theory "that once it is alleged that First Amendment rights may be infringed by congressional action the Judiciary may intervene to protect those rights." *Id.* at 509. Consequently, First Amendment balancing, which is often undertaken by courts when free speech or free press claims collide with legitimate legislative considerations, "plays no

part" in situations governed by the Speech and Debate Clause. 421 U.S. at 510, n. 16. Finally, the Court ruled that "in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it." *Id.* at 508. "The wisdom of congressional approach or methodology is not open to judicial veto." *Id.* at 509.

The court of appeals correctly applied these principles to the particular facts of this case. As the court noted, Congress has exercised since 1789 the broad power conferred by Article I, Section 5, Clause 2 to restrict the access of members of the press to its floors and galleries. Because of the heavy burden of legislative business, Congress has delegated the daily administration of the periodical press galleries to the Periodical Correspondents' Association, subject to the supervision of the Senate Committe on Rules and Administration and the Speaker of the House of Representatives. The Association acts as the agent of Congress in this administrative capacity, and its interpretation of the "Rules Governing Periodical Press Galleries" in this case was an act within the legitimate legislative sphere which would have been protected by the Speech and Debate Clause if undertaken by Members of Congress. Indeed, the Senate Rules Committee specifically treated *Consumer Reports*' application for admission to the periodical press galleries as a legislative matter by taking it up at a formal session of the Committee and endorsing the Association's recommendation. Accordingly, the actions of the Association are immune under the Speech and Debate Clause.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ a certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

REX E. LEE,
Assistant Attorney General.

LEONARD SCHAITMAN,
NEIL H. KOSLOWE,
Attorneys.

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